50TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { Ex. DOC. No. 246.

# RAILROAD INDEMNITY WITHDRAWALS.

## MESSAGE

FROM THE

## PRESIDENT OF THE UNITED STATES,

TRANSMITTING

*A communication from the Secretary of the Interior, with accompanying papers.*

APRIL 5, 1888.—Referred to the Committee on the Public Lands and ordered to be printed.

*To the Senate and House of Representatives:*

I transmit herewith a communication of the 3d instant from the Secretary of the Interior, submitting, with accompanying papers, a draught of a bill to provide for the revocation of the withdrawal of lands made for the benefit of certain railroads and for other purposes.

GROVER CLEVELAND.

EXECUTIVE MANSION,
*April* 5, 1888.

DEPARTMENT OF THE INTERIOR,
*Washington, April* 3, 1888.

The PRESIDENT:

SIR: On the 23d of May last the Secretary of the Interior, with your approval, laid rules upon certain Wagon and Railroad Companies, to aid in the construction of which Congress had theretofore made land grants, requiring the said companies to show cause by a day named why the indemnity withdrawals theretofore made for the benefit of said companies, respectively, should not be revoked, and the lands therein embraced restored to the public domain.

These rules were designed to embrace and require responses from all corporations claiming or entitled to have any lands which had been so granted either directly to such corporations or through the medium of any State or Territory. The rules were duly served; some of the corporations answered and others failed to do so. Copies of said rules and a list of the corporations answering are hereto appended.

After a full consideration of the answers and such arguments as the responding companies thought proper to submit, the Secretary of the Interior, on August 13, 1887, in a communication addressed to the Commissioner of the General Land Office, revoked the orders of withdrawal theretofore made of lands in the indemnity limits of the Atlantic and Pacific Railroad Company, giving his reasons at length for the conclusion arrived at. Thereafter, on August 15, following the ruling in said case, the Secretary revoked the indemnity withdrawals made for the benefit of certain other companies, a list of which, together with a copy of the decision in the case of the Atlantic and Pacific Railroad Company, will be found herewith. Each withdrawal, thus revoked, was made under claim of executive authority.

In the consideration of the answers and arguments of the different responding companies, and in the examination of the granting acts in relation to others, it was disclosed that, whilst all the withdrawals were made by executive orders, yet, in regard to some of the companies the executive orders were in obedience to legislative mandates to that effect.

For illustration of this point I beg to refer to the legislation whereby a land grant was made to the then territory of Minnesota, to aid in the construction of certain railroads described. The act of March 3, 1857 (11 Stat., 195), granted for said purpose six alternate sections of land, designated by odd numbers, on each side of the respective roads provided for; with the right to select from designated sections, if found, within another limit of fifteen miles, indemnity for deficiencies of granted lands. Subsequently, by act of March 3, 1865 (13 Stat., 526), this grant was increased to ten sections per mile and the indemnity limits extended to twenty miles. By section seven of this last act it was provided—

"That as soon as the Governor of said State of Minnesota shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said road and branches, then *it shall be the duty of the Secretary of the Interior to withdraw* from market *the lands embraced within* the provisions of *this act.*"

The legislative mandates, in relation to the other roads referred to, are substantially the same as in the act above quoted, except that contained in section four of the act of June 2, 1864, *supra*, where, upon the filing of the map of the modified route allowed by said act, the Secretary of the Interior is required to—

"reserve and cause to be certified and conveyed to said company * * * out of any public lands now belonging to the United States not sold," &c., "within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted * * * and if the amount of land * * * shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line * * * within twenty miles thereof."

In the case of the Cedar Rapids &c., Railroad Company v. Herring, 110 U. S., p. 27, the Supreme Court, construing this section and act, said that it "directs the Secretary of the Interior, when the new line

shall have been established, to reserve *all* the lands without regard to alternate sections within that limit." It is thus seen that under this law the Secretary was directed to place in reservation a solid block of land, so far as it was public and undisposed of, including both odd and even sections alike, thirty miles wide and two hundred and seventy miles long!

This reservation was established, as directed, and continues to the present day. It is true, it is not of the entire width for the whole length, because it impinged, in localities, upon other railroad grants. But, as an offset to this, where the new location, authorized by the act of 1864, diverges from that made under the original act of May 15, 1856, the two withdrawals—one of fifteen and the other of twenty miles limits—on each side of located lines, for a distance of fifty miles, cover a territory fifty miles wide, within which both odd and even sections are reserved. No other grant that I am aware of has similar provisions, excluding from settlement both the odd and even sections of the public domain for the benefit of a corporation. However wise such an enactment may have been, when made in 1864, there is no question, in my mind, as to the unwisdom of allowing it longer to exist.

My predecessor, Secretary Lamar, was in doubt as to whether, under any circumstances, he was clothed with authority to revoke the withdrawals made in obedience to these legislative mandates, and was of the opinion that under existing circumstances he had no such authority. Hence, no action was taken in respect to the lands within the indemnity limits of the roads referred to, and the same are yet withdrawn from market and excluded from settlement.

Beyond the exceptional language to be found in the several acts referred to, no facts or reasons have been shown, or are known to exist, peculiar to the cases of these several corporations, which should entitle them to any more favorable consideration than was shown to others; or which should enable them to keep the lands within their indemnity limits in a state of indefinite reservation. On the contrary, all the manifest public advantages of a revocation of the indemnity withdrawals of these lands are equally obvious; whilst the injustice and inconvenience resulting from withholding them longer from settlement are believed to be equally injurious to the public interests.

Concurring in the views of my predecessor as to the restricted authority of the Secretary of the Interior in the premises, I respectfully suggest that the condition of these grants in the particulars mentioned, be brought to the attention of Congress, to the end that, if in its wisdom such a course shall be deemed advisable, authority may be conferred upon the Department to revoke the withdrawals and restore the indemnity lands to market in the cases of these roads as in others; and to give this suggestion a more practicable form, I beg to submit herewith the draft of a bill, which appears adequate to that result, if enacted into law.

The following railroad companies will be affected by the proposed legislation:

Under section seven act of March 3, 1865 (13 Stat., 526):

The St. Paul, Minneapolis and Manitoba, St. Paul, Stillwater & Taylors Falls, Stillwater & St. Paul, St. Paul and Northern Pacific, Minnesota Central, Winona & St. Peter, and the Southern Minnesota Railroad Companies, and possibly the St. Paul & Sioux City R. R. Co.

Under section five, act of May 12, 1864 (13 Stat., 72):

The Sioux City & St. Paul, and the Chicago, Milwaukee & St. Paul Railroad Companies.

Under section four, act of June 2, 1864 (13 Stat., 95):

The Cedar Rapids and Missouri River Railroad Company, now operated by the Chicago and Northwestern Railroad Company.

Under section five, act of July 4, 1866 (14 Stat., 97):

The Southern Minnesota and Hastings & Dakota Railroad Companies.

Whilst considering questions relating to the land grants made by Congress, it has been disclosed that there is no provision of law by which a period can be fixed whereat said grants shall be determined by those charged with their administration, to have been finally closed. It seems to me that this is an omission which should be speedily remedied.

The statute books show that since 1823 Congress has made many such grants for wagon-roads, canals, river improvements and railroads. And during the sixty-five years which have passed since that date not one of the grants has been declared to be finally adjusted.

It is true some of them have been practically adjusted; in some instances by a full satisfaction of the grant; in others, because the grantee has obtained all the lands within the limits of the grant, yet leaving unsatisfied deficiencies. But none have been authoritatively or officially declared to be finally adjusted and closed, so far as I am advised. Until such authoritative declaration, there is nothing, that I know of in the law to prevent further investigation and action in perhaps the oldest of these grants.

If in years gone by a tract of land has been patented under one of the grants according to the construction of the law and rules then prevailing in relation to the administration of said grant, and under a different construction of law now prevailing it should be held that the patent was issued without any authority whatever, such patent might perhaps be void and the grantee ask for a proper adjustment of the grant and the patenting of other lands which properly passed under the same, according to the new construction of law. This would necessarily cause much hardship and injustice.

As an illustration of this, it may be stated that prior to the year 1883 it was held that the time of the survey of a railroad route in the field was the date of the definite location of the same, when the company's rights attached to the lands within the granted limits, which lands be-

came then identified by said location on the surface of the earth. This rule of the department was based upon an opinion of the Attorney General; and under it a number of grants were adjusted or partially adjusted and lands certified and patented to different grantees. But in the early part of 1883 the Supreme Court of the United States decided the case of Van Wyck v. Knevals (106 U. S., 360), wherein it was held that the date of the definite location was when a map approved by the Secretary of the Interior was filed in his office, and consequently the rights of the company to granted land did not attach until that time so as to cut off the rights of settlers, etc.

In some cases maps of definite location were not filed until construction was commenced, and in other cases not until it was completed along the whole line of the road. But after survey in the field or during the progress of the construction the claims of settlers to lands along the lines of roads were rejected and the same patented or certified to the beneficiaries under the grants, long before the lawful map of definite location was filed. The consequence of this change might be litigation and injury.

By the act of March 3, 1887 (24 Stat., 556), it is declared that if it appear "upon the completion" of an adjustment of a railroad land grant, "or sooner, that lands have been from any cause erroneously certified or patented" under such grant, "it shall be the duty of the Secretary of the Interior" to demand a reconveyance of said land, and upon refusal to comply, the Attorney General is required to institute legal proceedings to recover the same; and this leaves the threat of litigation to be continually overhanging, until the grant is authoritatively declared finally adjusted.

It is not difficult to suggest other cases to show the necessity for the legislation recommended.

But apart from evils which may be specified, it seems to me on general principles that it would be in the interest of good administration that there should be such a law, so that this Department could be relieved of the vast amount of labor which its employes are called upon to perform in relation to the re-investigation and re-adjustment of grants, all matters in relation to which, ought long since to have been finally closed beyond reopening.

The experience of ages has taught that in the ordinary affairs of men, when business matters are settled, some formal act is done in the nature of a declaration to that effect, either by the passing of receipts, giving releases, or doing something equivalent thereto. In the progress of time enlightened legislation has supplemented this experience by the enactment of statutes of repose, which pre-suppose, in the absence of direct evidence, that, after a certain time, such matters have been finally adjusted, settled and closed.

If such practice and law prevail in private business, where the transactions are comparatively small and inconsequential, affecting only in-

dividual interests, how much more important is it that some similar rule should obtain in matters of national importance, and of the magnitude of these grants, deeply affecting the property rights of millions of people, confined to no particular locality but living throughout nearly three-fourths of the area of the whole country.

Respectfully submitting to your better judgment these views I have prepared another section to meet them, which is presented as the third section of the proposed act, and beg your consideration thereof.

I have the honor to be very respectfully,

WM. F. VILAS,
*Secretary.*

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AN ACT to provide for the revocation of the withdrawal of lands made for the benefit of certain railroads, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled*, That section five of an act entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," approved May twelfth, eighteen hundred and sixty-four, and section seven of an act entitled "An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," approved March third, eighteen hundred and sixty-five, and also section five of an act entitled "An act making an additional grant of lands to the State of Minnesota in alternate sections, to aid in the construction of railroads in said State," approved July fourth, eighteen hundred and sixty-six, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be and the same are hereby repealed.

SEC. 2. That the provisions of section four of an act approved June second, eighteen hundred and sixty-four, and entitled "An act to amend an act entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State,' approved May fifteenth, eighteen hundred and fifty-six," be and the same are hereby repealed, so far as they require the Secretary of the Interior to reserve any lands but the odd sections within the primary, or six miles granted limits of the roads mentioned in said act of June second, eighteen hundred and sixty-four, or the act to which the same is amendatory; and all withdrawals of lands within indemnity limits heretofore made for the benefit of any road or roads, under or by virtue of said grants or any of them, and any reservations of lands made under said provisions of the act of June second, eighteen hundred and sixty-four, may be revoked, and the Secretary of the Interior is authorized, in his discretion, to restore said lands to settlement and entry, after affording due opportunity, by such notice as he may consider proper to give to claimants under said grants, or any of them, to show cause why said restoration should not be made.

SEC. 3. That whenever, in the opinion of the Secretary of the Interior, a grant of lands heretofore made by the United States to aid in the construction of any rail or wagon road, canal, or other work of internal improvement, has been adjusted, and he deems it advisable that said adjustment should be finally closed on the books of the Land Office, he shall cause such notice to be given, by advertisement or otherwise, as may seem to him proper, warning parties interested to come forward within three months and show cause why such adjustment should not

be at once closed. If a proper showing be made, he shall, as speedily as may be, determine the matters involved, awarding to said parties whatever they may be entitled to, and thereupon, or if no such showing be made, he shall at once direct the Commissioner of the General Land Office to close finally the adjustment of said grant, and the same shall not thereafter be re-opened. And after the closing of any such adjustment, the Secretary shall revoke all withdrawals theretofore made for such grant, and restore to settlement and entry, under the general land laws, all public lands withdrawn thereunder remaining undisposed of.

## RULE RETURNABLE JUNE 27, 1887, ENTERED ON CERTAIN RAILROAD COMPANIES TO SHOW CAUSE WHY THE LANDS HERETOFORE WITHDRAWN FOR INDEMNITY PURPOSES UNDER THE RESPECTIVE GRANTS TO SAID COMPANIES SHOULD NOT BE RESTORED TO THE PUBLIC DOMAIN.

DEPARTMENT OF THE INTERIOR,
*Washington, May 23, 1887.*

It appearing from the records of this Department that orders withdrawing lands from settlement under the public land laws within the indemnity limits of the following list of land grant railroads are still existing, and that these several roads have either made selection of all the lands to which they are respectively entitled, or have selected all liable to such selection, in lieu of those lost in place within the limits of their respective grants, viz:

| Name of road, and State or Territory. | Date of withdrawal. |
|---|---|
| STATE OF ALABAMA. | |
| South & North Alabama | June 19, 1850 |
| * Mobile & Ohio River | Sept. 20, 1850 |
| Alabama & Florida | May 17, 1856 |
| Alabama & Chattanooga | June 19, 1856 |
| STATE OF FLORIDA. | |
| Florida, Atlantic & Gulf Central | May 23, 1856 |
| Pensacola & Atlantic | May 23, 1856 |
| Pensacola & Georgia | May 23, 1856 |
| Pensacola & Alabama | June 9, 1856 |
| STATE OF IOWA. | |
| Burlington & Missouri River | Oct. 20, 1856† |
| | June 2, 1856‡ |
| Chicago, Rock Island & Pacific | Oct. 20, 1856† |
| | June 7, 1865‡ |
| Cedar Rapids & Missouri River | Oct. 20, 1856† |
| | June 12, 1875‡ |
| Dubuque & Pacific | ---------- |
| Chicago, Milwaukee & St. Paul | Sept. 12, 1864 |
| | Feb. 4, 1869 |
| Sioux City & St. Paul | Aug. 26, 1867 |
| STATE OF ILLINOIS. | |
| Illinois Central | ---------- |
| STATE OF KANSAS. | |
| Missouri, Kansas & Texas | Mar. 19, 1867 |
| St. Joseph & Denver City | April 8, 1870 |
| STATE OF LOUISIANA. | |
| Vicksburg, Shreveport & Texas | Oct. 22, 1856 |
| | Nov. 29, 1871 |
| New Orleans Pacific | Mar. 27, 1873 |
| | Oct. 15, 1873 |
| STATE OF MICHIGAN. | |
| Grand Rapids & Indiana | June 13, 1856 |
| | Oct. 23, 1866 |
| Flint & Pere Marquette | June 13, 1856 |
| Jackson, Lansing & Saginaw | Aug. 16, 1858 |
| Marquette, Houghton & Ontonagon | Apr. 24, 1860 |
| | Apr. 28, 1865 |
| Chicago and Northwestern | June 16, 1865 |
| STATE OF MINNESOTA. | |
| Southern Minnesota | Mar. 30, 1858 |
| | Aug. 23, 1866 |
| | Apr. 26, 1867 |
| | May 17, 1871 |
| Saint Paul & Sioux City | Mar. 21, 1858 |
| | Aug. 10, 1865 |
| | Oct. 10, 1869 |
| STATE OF MINNESOTA—continued. | |
| Winona & St. Peter | Mar. 25, 1858 |
| | Aug. 10, 1864 |
| | July 10, 1865 |
| | Aug. 15, 1867 |
| | Apr. 24, 1869 |
| St. Paul, Minneapolis & Manitoba, Main line. | Mar. 25, 1858 |
| | July 10, 1865 |
| | Aug. 15, 1867 |
| | Apr. 24, 1869 |
| Brainard Branch | Mar. 25, 1858 |
| | July 10, 1865 |
| Hastings & Dakota | July 12, 1866 |
| | Apr. 22, 1868 |
| Lake Superior and Mississippi | Nov. 2, 1866 |
| Minnesota Central | Dec. 6, 1867 |
| Northern Pacific | Dec. 26, 1871 |
| | Jan. 5, 1883 |
| | June 18, 1883 |
| | Oct. 11, 1883 |
| St. Vincent Extension | Feb. 9, 1882 |
| STATE OF MISSISSIPPI. | |
| Mobile & Ohio River | Sept. 20, 1850 |
| Vicksburg & Meridian | Aug. 9, 1856 |
| STATE OF WISCONSIN. | |
| Chicago & Northwestern | Nov. 30, 1857 |
| | Nov. 30, 1857 |
| Chicago, St. Paul, Minneapolis & Omaha. | Feb. 28, 1866 |
| | Feb. 28, 1866 |
| | June 12, 1856 |
| | Feb. 5, 1866 |
| Wisconsin Farm Mortgage Company. | ---------- |
| Northern Pacific | June 20, 1872 |
| | Oct. 20, 1883 |
| | Jan. 5, 1883 |
| IDAHO TERRITORY. | |
| Northern Pacific | Mar. 20, 1872 |
| | Mar. 30, 1872 |
| | Mar. 30, 1872 |
| Northern Pacific, Main Line: | |
| Kalama to Tenino | Jan. 21, 1874 |
| Tenino to Takoma | Nov. 12, 1874 |
| Wallula to Spokane Falls | Nov. 13, 1880 |
| Spokane Falls to Pend d'Oreille | June 9, 1884 |
| Pend d'Oreille to Montana | Sept. 1, 1884 |
| Yakima to Ainsworth | Jan. 6, 1885 |
| Ainsworth to Swank Creek | Jan. 6, 1885 |
| Takoma, east twenty-five miles | Nov. 28, 1884 |
| 25 to 50 miles east | Nov. 28, 1884 |

* The Mobile & Ohio and the Illinois Central Companies should not have been included within this rule or the letter of May 20, as the order of withdrawal made for the benefit of said companies had been revoked, and said companies were included by mistake.

† Date of withdrawal of odd sections. ‡ Date of withdrawal of even sections.

And it now appearing from said records that there is no sufficient reason for longer continuing in force the said several orders of withdrawal, now, rule is hereby entered on the said several land grant railroad companies to show cause, on or before the 27th day of June, 1887, why the said several orders of withdrawal from settlement of the lands within the indemnity limits of their several roads should not be revoked, and the lands therein embraced restored to settlement.

Returnable before the Secretary of the Interior on the 27th day of June, 1887, at 10 o'clock, a. m.

L. Q. C. LAMAR,
*Secretary.*

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RULE RETURNABLE JUNE 28, 1887, ENTERED ON CERTAIN RAILROAD COMPANIES TO SHOW CAUSE WHY THE LANDS HERETOFORE WITHDRAWN FOR INDEMNITY PURPOSES UNDER THE GRANTS TO SAID COMPANIES SHOULD NOT BE RESTORED TO THE PUBLIC DOMAIN.

DEPARTMENT OF THE INTERIOR,
*Washington, May* 23, 1887.

It appearing from the records of this Department that orders withdrawing lands from settlement under the public land laws within the indemnity limits of the following list of land grant railroads are still existing, and that these several roads have not informed this Department to what extent they are entitled to lands within such indemnity limits by reason of those lost in place of their respective grants, and that ample time has been given them to assert their rights in this behalf, namely:

| Name of road, and State or Territory. | Date of withdrawal. |
|---|---|
| STATE OF ALABAMA. | |
| Coosa & Tennessee | June 19, 1856 |
| Selma, Rome & Dalton | June 19, 1856 |
| Mobile & Girard | June 19, 1856 |
| STATE OF ARKANSAS. | |
| St. Louis, Iron Mountain & Southern | |
| STATE OF CALIFORNIA. | |
| California & Oregon | Oct. 29, 1867<br>Sept. 6, 1871<br>Feb. 18, 1885 |
| Southern Pacific: | |
| Main Line | May , 1867 |
| Branch Line | May 10, 1871 |
| STATE OF FLORIDA. | |
| Florida Railway Navigation | Sept. 6, 1856 |
| STATE OF MICHIGAN. | |
| Marquette, Houghton & Ontonagon | Apr. 24, 1860 |
| STATE OF MISSISSIPPI. | |
| Gulf & Ship Island | Aug. 9, 1856 |
| STATE OF MISSOURI. | |
| St. Louis, Iron Mountain & Southern | |
| STATE OF OREGON. | |
| Northern Pacific | Aug. 13, 1870<br>Jan. 8, 1885 |
| Oregon & California | Jan. 31, 1870<br>Apr. 7, 1870<br>July 12, 1870<br>Mar. 31, 1871<br>July 5, 1883<br>July 5, 1883<br>July 5, 1883<br>Sept. 3, 1883<br>Oct. 27, 1883<br>Oct. 27, 1883<br>Dec. 19, 1884 |
| Oregon Central Wagon Road | May 5, 1871<br>June 25, 1879 |
| Dalles Military Wagon Road | Dec. 14, 1871 |
| ARIZONA TERRITORY. | |
| Atlantic & Pacific | May 17, 1872 |
| IDAHO TERRITORY. | |
| Northern Pacific | Apr. 15, 1872 |

| Name of road, and State or Territory. | Date of withdrawal. | Name of road, and State or Territory. | Date of withdrawal. |
|---|---|---|---|
| MONTANA TERRITORY. | | WASHINGTON TERRITORY. | |
| Northern Pacific | Sept. 29, 1883<br>Oct. 8, 1883<br>June 8, 1883<br>June 9, 1883<br>Nov. 10, 1883<br>June 8, 1883<br>June 9, 1883<br>July 3, 1883<br>Sept. 25, 1884<br>Feb. 20, 1885 | Northern Pacific | Jan. 21, 1874<br>Nov. 12, 1874<br>Nov. 13, 1880<br>June 9, 1884<br>Sept. 1, 1884<br>Jan. 6, 1885<br>Jan. 6, 1885<br>Nov. 28, 1884<br>Nov. 28, 1884 |
| NEW MEXICO TERRITORY. | | | |
| Atlantic & Pacific | May 8, 1872 | | |

And it now appearing that no sufficient reason exists for longer continuing in force said several orders of withdrawal, or that a time certain should be fixed within which the rights of these several roads should be asserted and that lands to which said railroad companies are not entitled in said indemnity limits should be restored to settlement, now, rule is hereby entered on said several railroad companies to show cause on or before the 28th day of June, 1887, why said several orders of withdrawal should not be revoked, or such other action taken as shall speedily restore such lands to the public domain for settlement.

Returnable before the Secretary of the Interior on the 28th day of June, 1887, at 10 o'clock a. m.

L. Q. C. LAMAR,
*Secretary.*

NOTE.—Under the foregoing rules to show cause, etc., the following companies filed answer:

Alabama and Chattanooga R. R. Co., Atlantic and Pacific R. R. Co., California and Oregon Land Co., California and Oregon R. R. Co., consolidated with the Central Pacific R. R. Co., Chicago, St. Paul, Minneapolis and Omaha Ry., Dalles Military Road Company, Flint and Pere Marquette R. R. Co., Florida Railway and Navigation Co., Gulf and Ship Island R. R. Co., Hastings and Dakota Ry. Co., Marquette, Houghton, and Ontonagon R. R. Co., Missouri, Kansas and Texas Ry. Co., Mobile and Girard Railroad Co., New Orleans, Baton Rouge and Vicksburg R. R. Co., New Orleans Pacific R. R. Co., Northern Pacific R. R. Co., Oregon and California R. R. Co., Oregon Central Wagon Road Co., Pensacola and Atlantic R. R. Co., St. Louis, Iron Mountain and Southern Ry. Co., St. Paul and Duluth R. R. Co., St. Paul and Northern Pacific Ry. Co., St. Paul, Minneapolis and Manitoba Ry. Co., St. Paul and Sioux City R. R. Co., Sioux City and St. Paul R. R. Co., Southern Pacific R. R. Co., Tennessee and Coosa R. R. Co., Vicksburg and Meridian R. R. Co., Vicksburg, Shreveport, and Pacific R. R. Co., Winona and St. Peter R. R. Co., Wisconsin Central R. R. Co., Wisconsin Farm Mortgage Co.

# RAILROAD INDEMNITY WITHDRAWALS.

ANSWERS FILED UNDER THE RULE ENTERED ON CERTAIN RAILROAD COMPANIES TO SHOW CAUSE WHY LANDS FORMERLY WITHDRAWN FOR INDEMNITY PURPOSES SHOULD NOT BE RESTORED TO THE PUBLIC DOMAIN.

# RAILROAD INDEMNITY WITHDRAWALS.

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ALABAMA AND CHATTANOOGA R. R. CO.

WASHINGTON, D. C. *June* 10, 1887.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR: Now comes John Swann and John A. Billups, trustees of the lands of the railroad lately known as the Alabama and Chattanooga Railroad of Alabama, and for answer to the rule to show cause why the withdrawal of lands within the indemnity limits of said road should not be revoked, and the lands embraced therein restored to settlement, said trustees answering respectfully show:

First. That by the act of Congress approved June 3, 1856, (11 Statutes p. 17) there was granted to the State of Alabama to aid in the construction of the railroads then known as the Wills Valley Railroad, extending from near Gadsden to the Georgia State line, and to the Northeast and Southwestern Railroads, extending from near Gadsden to a point on the Alabama and Mississippi State line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads, and where any of said sections within the granted limits had been sold or disposed of or the right of pre-emption had attached thereto at the date of the definite location of the roads, then the agent of the State appointed by the Governor was authorized to select other lands in lieu of the lands so lost as aforesaid from the nearest tiers of sections lying outside of the six mile or granted limits and within fifteen miles on each side of the line of the road.

The lands within fifteen miles on each side of the roads were withdrawn by telegraphic order of the Commissioner of the General Land Office dated June 19, 1856, but this order was subsequently modified so as to authorize the entry of the lands by pre-emption up to the date of

the filing of the maps of definite location, which took place on October 11, 1858; and from and after that date the withdrawal of lands within the indemnity limits became absolute.

Secondly. Said trustees further answering respectfully show that said two railroads were consolidated and became one road under the name and style of the Alabama and Chattanooga Railroad by authority of an Act of the Legislature of Alabama approved October 6, 1868, and that all of the lands granted to aid in the construction thereof were conveyed to the undersigned as trustees for the State and bondholders by George S. Houston, Governor of Alabama, on February 28, 1877, under an act of the Legislature of said State commonly known as the Debt Settlement Act, dated February 23, 1876.

Thirdly. Said trustees further answering respectfully show that by an act of Congress approved April 10, 1869, (16 Stat. p. 45) the grant of lands to aid in the construction of the Alabama and Chattanooga Railroad was revived, and the time for the completion of the road was extended for three years from and after the date of said act, and that said road was fully constructed and completed within the time prescribed by said last mentioned act, to wit, in the month of May 1871 which fact is evidenced by the certificate of the Governor of Alabama which is on file in the General Land Office.

Fourthly. Said trustees further answering respectfully state that the grant made by the act of Congress of June 3, 1856, was in all its legal aspects a contract between the United States and the State of Alabama by which the United States agreed to convey to the State of Alabama in consideration of the construction of the road in manner and form as provided in the act a quantity of land equal to six sections per mile for every mile of road so constructed; and said trustees allege that said contract has been fully performed and executed by the State of Alabama and her grantees, the said Railroad Company but that the United States has failed to carry out its contract in the premises by conveying to the State the amount of lands called for by said contract that is to say, the United States agreed to pay to the State of Alabama to aid in the construction of said road, 1,013,581 acres of land, but up to the present date has conveyed to said State only 649,677 acres.

Fifthly. Said trustees further answering respectfully show that about 60,000 acres of lands lying within the indemnity limits of said road were selected by the agent appointed by the Governor several years ago in part satisfaction of the grant, but owing to official negligence in the General Land Office the titles to said lands have not been made to the State, and said selections are still pending and undisposed of.

Sixthly. Said trustees further answering respectfully show that said pending selections of 60,000 acres includes all or nearly all of the vacant available lands which are subject to selection within the indemnity limits of said road for the entire length thereof, and if said selected

lands are all conveyed to the State there will be a deficiency in the grant of over 300,000 acres because of the fact that all of the lands within the indemnity limits from which selections can be made have been exhausted or will be exhausted without satisfying the grant within the number of acres above specified.

Seventhly. Said trustees further answering respectfully state that the withdrawal of the lands within the indemnity limits of said road was lawfully made by Thomas A. Hendricks, Commissioner of the General Land Office, and that the authority to make withdrawals of like character has been frequently sustained by the highest judicial authority; Wolcott *v.* Des Moines (5 Wall., 681); Homestead Co. *v.* Valley R. R. (17 Wall., 153); Wolsey *v.* Chipman (101 U. S., 755); Dubuque and Sioux City R. R. Co. *v.* Des Moines Valley R. R. Co. (109 U. S., 329); Grisar *v.* McDowell (6 Wallace, 381); and the Secretary of the Interior cannot now revoke the withdrawal for the Alabama and Chattanooga Railroad without violating the contract between the Government and the State, because all of the lands withdrawn and 300,000 acres more than those withdrawn are needed to satisfy the grant; and if any land should be lost to the road by the revocation of the withdrawal it would be a violation of the contract *pro tanto* between the United States and the State of Alabama and an act of bad faith on the part of the United States.

Eighthly. Said trustees further answering respectfully show that nearly all of the lands selected by the agent of the State in satisfaction of this grant which have not yet been conveyed to the State by proper evidences of title as required by law, lie within the indemnity limits of the Alabama and Chattanooga Railroad, and also within the limits of the Coosa and Tennessee Railroad, the Coosa and Chattooga Railroad and the Alabama and Tennessee River Railroad, near the town of Gadsden, at which point the limits of said railroads overlap and conflict with one another; that none of said last-mentioned railroads have ever been constructed, and the State of Alabama in the exercise of the power of disposal conferred upon said State by the Act of Congress of June 3, 1856, has granted said lands to the Alabama and Chattanooga Railroad by act of the Legislature of said State approved February 20, 1883; and the Commissioner of the General Land Office by a decision dated May 28, 1887, rejected a part of said selections amounting to 27,000 acres, and refused to recognize the power of the State to dispose of the same under the act of Congress of June 3, 1856, from which action an appeal has been taken to the Department of the Interior; and said Trustees allege that said decision will be made a test case as to the right of the State to all or nearly all of the uncertified lands lying within the indemnity limits of said railroad; and for this reason alone no action looking to the revocation of the order withdrawing the lands in the indemnity limits should be taken by the Interior Department

until the question of the right of the State to select the lands lying within said indemnity limits has been finally determined by the Department of the Interior.

Respectfully submitted,

JOHN SWANN,
JOHN A. BILLUPS,
*Trustees.*

By M. D. BRAINARD,
*Attorney in fact.*

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ATLANTIC & PACIFIC R. R. CO.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR: Now comes the Atlantic & Pacific Railroad Company, by its Counsel, and answering the rule issued by you upon said Company on May 23rd, 1887, and returnable June 28th, 1887, to show cause why its existing indemnity withdrawal "should not be revoked or such other action taken as shall speedily restore such lands to the public domain for settlement," respectfully shows:

First. By act approved July 27th, 1866 (14 Stats., p. 292), Congress created this Company, and authorized its construction of a railroad from Springfield, Mo., via the 35th parallel, to the Pacific. In aid thereof, it made to it a grant of—

every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line as said Company may adopt, through the territories of the United States, and the alternate sections of land per mile, on each side of said railroad, whenever it passes through any state, and whenever on the line thereof, the United States have full titled, not reserved, sold granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the Office of the Commissioner of the General Land Office, and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said Company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections and not including the reserved numbers.

Second. The Company accepted the grant, made due location of its line, filed maps thereof with the Commissioner, and thereupon the odd sections falling within the presented lateral limit—both place and indemnity—were withdrawn "from pre-emption or homestead entry, private sale or location" and including "both surveyed and unsurveyed" sections.

Third. Thereafter the Company constructed its road in Missouri to Vinita, Indian Territory, which portion by foreclosure-sale and re-or

ganization is now known as the St. Louis & San Francisco R. R. and which portion the present return does not cover.

Fourth. The Atlantic & Pacific Company proper has also constructed 565 miles of road from Isleta Junction, New Mexico, to the western boundary of Arizona. This constructed road has been duly accepted by the President of the United States, upon the report of the Commissioners appointed to inspect the same, in accordance with Sec. 4 of the granting act.

Fifth. Thereby it earned the lands granted and situate opposite such constructed road—as also the right to select indemnity for such thereof as were at date of definite location found to "have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of."

Sixth. Opportunity for selection of either place or indemnity lands was defeated by the failure of the Government to make survey thereof, whereby identification could be had, losses ascertained and complete selection made. To remedy this situation, and being required by law to pay the cost of surveying, selecting and conveying its lands, the Company asked to anticipate same by depositing the necessary funds to secure the making of the surveys. Such application your predecessor denied.

Seventh. Thereupon, and on September 3rd, 1885, the Company presented to the Register and Receiver of each land district whereon its grant was situated, a broad application to select all the odd sections, both surveyed and unsurveyed, within its indemnity belt, accompanied by full statement showing that if given every odd section therein, its grant would yet be deficient more than one million of acres on that portion which had been earned by construction. Such application was accompanied by offer of payment of all statutory fees and costs of surveying &c., when advised of the amount required. Same was denied by the local officers in each instance, and even filing thereof refused at some of the offices.

We present herewith copy of the original of such application then made to the San Francisco Office, and returned to the Company with the endorsement of the Register & Receiver thereon. (Exhibit A.)

Therefrom it appears that the area of the grant opposite constructed road is as follows:

| | Acres. |
|---|---|
| In New Mexico from Isleta West | 4,080,640 |
| In Arizona | 10,393,126 |
| Total area of grant | 14,473,766 |

The area lost therein by private grants and reservations wherefor indemnity is provided, is as follows:

| | |
|---|---|
| In New Mexico West of Isleta | 1,525,760 |
| In Arizona | 1,785,126 |
| | 3,310,886 |

Such losses are ascertainable in absence of township surveys. What may be lost by prior pre-emption and homestead settlements or on account of minerals (for which the grant expressly provides indemnity) cannot yet be ascertained. But to satisfy the loss now capable of ascertainment, viz: 3,110,886 acres, the whole indemnity belt opposite constructed road is greatly deficient.

The area of such indemnity limit is as follows:—

| | | |
|---|---|---|
| In New Mexico West of Isleta | 966,400 | |
| Of which there is included in private grants and reservations... | 311,400 | |
| Leaving available | | 655,000 |
| In Arizona | 2,024,842 | |
| Of which there is included in private grants and reservations... | 568,824 | |
| Leaving available | | 1,454,000 |
| Total of available indemnity lands | | 2,109,000 |
| The estimated loss is as stated above | | 3,310,886 |
| Leaving the grant deficient | | 1,201,886 |

if every available acre within the indemnity belt coterminous with constructed road were received.

Eighth. April 14th, 1886, the Commissioner of the General Land Office recommended revocation of this Company's indemnity withdrawals in New Mexico, Arizona and California. Thereon you issued rule upon this Company returnable May 14th, 1886, to show cause why same "should not be revoked, and the unappropriated lands embraced therein should not be restored."

Pursuant thereto Counsel were orally heard before you on the return to such rule—presenting *in extenso* the reasons as given above why such revocation should not be made. As no action has ever been taken by you thereunder, it is a reasonable presumption that the showing of facts has convinced you that such order should not be made. The Act of July 6th, 1886, forfeiting the Company's grant opposite the unconstructed road in New Mexico and California of itself vacated *pro tanto* the indemnity withdrawals, leaving operative the withdrawal opposite the constructed road.

Ninth. The rule which this Company is again required to answer is founded upon the expressed assumption that the Company has failed to inform the Department to what extent it is entitled to lands within such indemnity limits by reason of those lost within its grant in place and that ample time has been given it to assert its rights in that regard.

It is respectfully insisted that the facts above recited demonstrate that this Company has not so failed to inform the Department, but on the contrary has given most ample and seasonable information with respect thereto.

Tenth. With every desire to make known its rights and claims in the premises, and to conform to existing regulations respecting the manner

and form of indemnity selections, the Company has during the present month made selection—

1st. Of all surveyed indemnity lands subject thereto opposite its constructed road, designating the specific tracts lost in place for which such indemnity is taken. These selections are accompanied by all prescribed affidavits and payment of legal fees. Same have been accepted by the local officers and are in transit to the General Land Office.

2d. It has similarly applied to select all unsurveyed lands, giving description by section, township and range, as same are protracted on the maps of withdrawal—calculating each section as containing 640 acres and approximating the true description as nearly as possible therefrom. Such lists also specify the tracts lost in place for which such indemnity is taken. These lists are also accompanied by all prescribed affidavits and proofs, and were presented to the local officers with tender of all proper fees. The Company is advised that such officers declined to accept same solely because the selected lands are unsurveyed.

Therefore it is submitted this Company has done all the acts and things within its power to make known in most technical form its claim and right to those indemnity lands.

The grant is one of quantity, to the amount of twenty sections per mile on each side of the road. The Supreme Court so ruled in the United States *v.* Burlington R. R. Co., (98 U. S. 334–339) where the granting language is precisely the same.

Within the indemnity limits "the Company should have the opportunity to take lands acre for acre, for all those lost in place." (2 L. D. 516.)

They have been so taken to the acreage available, in the mode prescribed by your Department. Any technical omission or defect therein proceeds solely from the failure of the United States to do the necessary acts whereby such description can be made perfect.

Therefore it is respectfully submitted in direct answer to the pending rule—

1st. That this Company has not failed to give ample notice of its indemnity right and claim.

2nd. That the notice heretofore and now given, claearly shows that by past and present selection of all lands within its available indemnity limits, the grant as earned is deficient more than one million acres.

3rd. That the contract between the United States and this Company would be be seriously violated if with knowledge of these facts, any revocation of the existing idemnity withdrawals is made, or other action taken tending to defeat, impair or cloud the rights of this Company therein.

4th. That delay in selection has arisen from the failure of the United States to make survey of the granted and indemnity lands; to ascertain and settle the boundaries of the pending private land claims with such certainty that precise acreage of loss therein can be determined;

to permit settlers prior in time to the railroad grant to make known their claims by proper description. And finally by its affirmative acts in creating Indian and other Reservations within the railroad grant enlarging others theretofore created, and refusal to permit surveys to be made on the Company's deposit of the cost thereof.

Notwithstanding these difficulties the Company has done all things possible to identify its losses and make its selections, and submits that neither in law, equity, or good conscience should the existing withdrawal be rescinded.

Respectfully submitted,

BRITTON & GRAY,
*Atty's for Alantic & Pacific Ry. Co.*

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CALIFORNIA AND OREGON LAND COMPANY, CLAIMANT UNDER OREGON CENTRAL WAGON ROAD CO.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR:—Now comes the California and Oregon Land Company, successor by purchase to the land grant of the Oregon Central Wagon Road Company, and, by its counsel, answering the rule entered by you on said latter Company on May 23rd 1887, and returnable June 28, 1887, to show cause why its existing indemnity withdrawal "should not be revoked, or such other action taken as shall speedily restore such lands to the public domain for settlement" respectfully shows:—

First.—That by Act of Congress approved July 2nd 1864, (13 Stats., p. 355) lands were granted to the State of Oregon "to aid in the construction of a military wagon road from Eugene City to the Eastern boundary of the State."

Such grant was of—

"alternate sections of public lands, designated by odd numbers for three sections in width on each side of said road."

And that same was of quantity is made certain by the Act of December 26th 1866 (14 Stats., p. 374) which provided that the former act "be amended as follows:—That there be, and is hereby granted to said State, for the purposes afresaid, such odd sections or parts of odd sections not reserved or otherwise legally appropriated, within six miles on each side of said road, to be selected by the Surveyor General of said State as shall be sufficient to supply any deficiency in the *quantity of said grant as described*, occasioned by any lands sold, or reserved, or to which the rights of pre-emption or homestead have attached, *or which for any reason were not subject to said grant within the limits designated in said Act.*"

Second:—This grant was accepted by the State, by appropriate legislation conferred on the Oregon Central Company, by whom the road

was definitely located and thereafter seasonably and properly constructed, as appears by the certificates of the Governor of said State certifying such construction as by the original granting act required.

Third:—The length of said constructed road is 419½ miles.

| | Acres. | Acres. |
|---|---|---|
| The estimated quantity of the grant is | | 720,000 |
| There has been conveyed thereunder— | | |
| In three mile limits | 364,663.93 | |
| In six mile limits | 37,576.74 | |
| | | 402,240.67 |
| Leaving yet due | | 317,759.33 |

(General Land Office Report 1885, — p. 194.)

Fourth:—A large portion of the grant both within the original three and the enlarged six mile limits yet remains unsurveyed. Hence it is impossible for the Company to ascertain its losses in place or to select indemnity therefor. In so far as such surveys have yet extended, such losses have been ascertained, indemnity selections made, and the lands thus selected have been duly certified to the State.

Hence it is respectfully submitted that this Company has not failed to inform the Department to what extent it is entitled to lands within such indemnity limits. Its diligence has kept pace with its opportunity. As fast as additional surveys shall give such renewed opportunity, it will be immediately availed of.

Fifth:—On ——— the Commissioner of the General Land Office recommended suit by the United States to vacate the outstanding certifications under this grant—

| | Acres. |
|---|---|
| (A). For lands in the Klamath Indian Reservation as excluded from the grant | 106,671.76 |
| (B). For lands outside said Reservation but as excluded from the grant because within general Indian Country at date of grant and definite location | 162,564.61 |
| (C). For lands otherwise erroneously conveyed outside of said Klamath Reservation | 2,709.06 |
| Total | 271,945.43 |

Such recommendation is now before you for hearing and decision. The acreage involves more than one half of the quantity now certified, and more than one third of the entire quantity of the grant. If suit be brought as recommended and such titles are vacated thereby, an equal acreage will be due under the plain terms of the grant and must be satisfied within the indemnity belt. Manifestly pending your determination in the premises, or the conclusion of such suit if brought, the government should withhold from adverse appropriation the lands wherefrom the satisfaction of such threatened loss must be sought. Otherwise a manifest failure of justice must ensue and the expressed object of the grant be defeated.

Wherefore the California and Oregon Land Company insist the pending withdrawal of indemnity lands should be continued until—

1st. Survey of that portion of the granted and indemnity lands yet unsurveyed, and reasonable opportunity afforded for indemnity selection to satisfy losses therein; and

2nd. Determination of pending recommendation for suit and if directed until final result thereof, to satisfy threatened loss covering more than one third of the entire quantity of the grant.

Respectfully submitted,

BRITTON & GRAY,
*Atty's for C. & O. L. Co.*

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CALIFORNIA & OREGON RAILROAD CO., CONSOLIDATED WITH THE CENTRAL PACIFIC RAILROAD CO.

To the Honorable SECRETARY OF THE INTERIOR:

The California and Oregon Railroad Company (consolidated with the Central Pacific Railroad Company), to which a grant of lands was made by Congress by act approved July 25, 1866 (14 Stat., 239), herein sets forth some of the reasons why the withdrawals of lands made under and according to said act, to aid in adjusting its grant of indemnity lands, should not be revoked.

The first withdrawal (1867–1868) extended along a definitely located route from Roseville, on the Central Pacific railroad, to Salt Creek, in township thirty-two north, range five west, Mount Diablo base and meridian, a distance of over sixty miles.

The second was ordered August 25, 1871, on a definitely located route northward, from Salt Creek to the north line of township forty-six north, range five west, a distance of over sixty miles. (For extracts from these orders see appendix.)

The third, recently made, merely completes the definite location of the road to its prescribed terminus.

1. A primary reason why these withdrawals should not be revoked is that they were made in obedience to and in the manner provided by the act of Congress, which, in section 2, made it the duty of the Secretary to withdraw the lands.

Having been so made, for a purpose not yet executed, by the officer whose duty it was to make them, and who acted understandingly in the matter, they cannot be revoked by a successor in the same office while the facts which led to them remain the same and the law has not been changed. The case comes within the principles applicable to decisions. The principle of "*stare decisis*," that of "*res adjudicata*," and that of "*functus officio*" unite to protect these withdrawals.

2. It has not been shown and cannot be deduced from the known facts that any more land has been withdrawn than will be needed to fulfill the intention of Congress as expressed in the grant.

3. Should the Department order a restoration of lands under the circumstances now existing the losses accruing to the Government would be greater than the advantages.

The act of Congress of July 25, 1866, is a law as well as a grant. Its provisions are binding on the United States.

## I.

Let us consider the provisions of the statute, particularly in sections two, four, and five (14 Stat., 239):

SEC. 2. *And be it further enacted*, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers as aforesaid, *nearest to and not* more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, *the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of the railroad*, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the States, respectively, wherein they are situated; and the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold. * * *

The grant, as defined in this section, is to a certain amount. Whatever tracts are excepted from the grant in primary limits are made up by selections to be made *by the company* within secondary limits. Mark this! The Secretary of the Interior directs the *manner* of making selections, but they are made "by said company." The Secretary has not a discretion to say that no selections shall be made, for the law says they "*shall be* made by said company." The law contemplates fairness in administration. It does not authorize a denial of all the company's rights. It requires the Secretary of the Interior to "withdraw from sale public lands herein granted on each side of said railroad" within the specified limits. The withdrawal is intended to aid the grant—as the first step in executive administration of it. It cannot be made to-day and revoked to-morrow without cause. It is good, and stands with the law, while the law stands unexecuted. It is irrevocable so long as the quantity of land earned by the company remains unpatented.

The principle of *stare decisis* has been established by the judicial tribunals as a barrier to the fluctuations of judicial opinion upon the same or a similar state of law and facts. It appears to have been established for the guidance of the community and the stability of business enterprises.

The cognate principle of *res adjudicata* appears also to apply in this matter. Between the two parties, the United States and this company, the withdrawals of the lands have heretofore been considered and decided. They were made upon applications therefor by the railroad company.

And there is a third principle—variously related to the two above stated—that of "*functus officio*," which protects the existing withdrawals, whilst the law and facts remain as they were when the withdrawals were made.

Not attempting a classification of the authorities under these three principles, I respectfully refer to the decision of the Court of Claims in the Illinois case and the authorities cited therein, 4th vol. Decisions, at p. 6; also to the case of the Pueblo of San Francisco, 5th vol., at p. 492, and the cases cited therein.

A Secretary of the Interior has not power to set aside or annul the act of his predecessor because he believes it to have been erroneous. (Stone *v.* The United States, 2 Wall., 535.)

Nor can a court, after evidences of title have been delivered to a claimant, annul a patent or survey on the mere allegation that it was erroneous or on allegations of frauds not clearly proven. (The Maxwell Grant Case, dec. U. S. Sup. C't Oct. T., 1886.)

The Attorney General's office has held uniformly since 1825 that "the official acts of a previous administration are to be considered by its successor as final, so far as the Executive is concerned." (13 Opinions, p. 33; 15 Opinions, p. 208.)

This principle is to be especially adhered to where there has been no change in the law or facts. (15 Opinions, p. 315.)

If one Secretary cannot review and change the actions of his predecessor, *a fortiori* he cannot recall it or annul it.

Where a grantee of the United States has made contracts upon the faith of a decision of a former Secretary the decision, for that reason, should not be changed if it could be. (Attorney General Johnson, 5 Opinions, at p. 244.)

Attorney General Cushing held that what had been done by Secretaries Stuart and McClelland in certifying lands to the State of Iowa under the Des Moines grant could not be subsequently undone by the same authority.

II.

Section 4 of said act of July 25, 1886, provides that, upon the full completion and equipment of "twenty or more more consecutive miles" of the line of the road and telegraph, and report thereof to the Presi-

dent of the United States, thereupon " patents shall issue for the lands hereinbefore granted *to the extent of and coterminous with the complete section of said railroad and* telegraph line as aforesaid, *and from time to time whenever twenty or more* consecutive miles of the said road and telegraph shall be completed and equipped as aforesaid *patents shall in like manner issue upon the report of said Commissioners*," &c.

The entire road is about 291 miles long. Of this 151.33 miles were completed and accepted by the President prior to the 1st of July, 1880, the time prescribed for completion. Since then forty miles in addition were accepted by President Arthur in February, 1885, and sixty miles more have since been completed, making 251.33 miles.

The company has not as yet obtained patents for all the lands opposite the portion of road completed in due time.

Along the 151.33 miles, at 20 sections per mile, if the road was straight there would be 1,937,024 acres, and in fact there is not less than 1,800,000 acres in quantity. The company has received patents for only 1,362,436.61 acres, as stated in annual report for 1886, p. 298, leaving due a balance of 437,566.39 acres.

On the 100 miles additional the " amount" or quantity of 20 sections, or 12,800 acres per mile, would approximate 1,280,000 acres. It is actually more than 1,000,000 acres. Opposite this part of the line the company has not received a patent to a single acre.

Along the 191 miles of accepted road, by inspection of the books of the land offices, we have ascertained that about 900,000 acres within the twenty-miles limits may be designated as lands lost to the grant, for which the company is entitled to indemnity. The indemnity selections actually made amount to 460,982 acres, leaving due 440,000 acres.

The quantity of the grant which will probably be realized by the grantee is stated in the annual report of the Commissioner of the General Land Office for 1875, p. 409, at 3,000,000 acres.

As we have estimated it at 2,800,000 acres for 251 miles, our estimate for the entire 291 miles would be 3,300,000 acres, and the quantity due and hereafter to be patented for the whole road would be about 2,000,000 acres.

The register and receiver at Shasta were advised by the Commissioner's letter of March 14, 1885, of the acceptance of forty miles of road by the late President Arthur. Thereupon the company, in pursuance of law and departmental instructions, presented lists in May and June, 1885, to those officers and paid the fees and costs and obtained the certification of 14,596.73 acres of granted tracts upon lists Nos. 7 and 8. The lists were sent to the General Land Office, where they now repose. The Commissioner will issue no patents.

On the 26th June, 1885, he wrote to the officers at Shasta (3d Land Decisions, p. 604) a letter, a copy of which I also place in the appendix. He nullified the President's acceptance of the road, and told the officers that "I do not think it a matter of official duty, under my re-

"sponsibilities as an executive officer of the Government, to authorize "selections to be made pending such action as Congress may please to "take."

As a consequence the local officers have since refused to allow selections of the granted lands. The company accordingly tenders the fees and costs, and appeals from the refusals of the local officers. These appeals also repose in the files at the General Land Office.

As a specimen of the course lately taken by the register and receiver in such cases I here insert a copy of their decision on the Shasta indemnity list 9, embracing 4,160 acres:

U. S. LAND OFFICE,
*Shasta, Cal'a, February* 19, 1887.

We do hereby certify that on the 14th day of February, 1887, Wm. inger, Jr., attorney for the Central Pacific Railroad Company, offered e foregoing list for our filing and approval, and also tendered the m of $52 as payment of fees for the same, and that we decline to receive the said tender and to file and approve said list, for reasons stated in the Hon. Commissioner's letter "F," dated June 26, 1885, which gave us notice that "the matter of the enforcement of the forfeiture of the grant to said railroad company, which has been incurred, having become a subject of congressional consideration, and no positive expression of the legislative will having been reached, the Hon. Commissioner did not think it a matter of official duty, under his responsibility as an executive officer of the Government, to authorize selections to be made pending such action as Congress may be pleased to take."

SYLVESTER HALL, *Register.*
W. H. BICKFORD, *Receiver.*

The act of Congress quoted above, section 2, says:

"There may be, and is hereby, granted to said company * * * public lands, designated by odd numbers, * * * to the amount of twenty alternate sections per mile, ten on each side," and that for tracts within twenty miles excepted from the grant "other lands *shall be selected by said company.*"

But the orders of the Commissioner are that "other tracts shall not be selected by said company."

The President of the United States has approved the act of Congress and has accepted the constructed road under and according to the said act.

It is difficult to perceive any justification for a further nullification of this grant by restoring its lands to market and selling them on account of the Government.

Such action would utterly defeat the will and intention of Congress, which has the power, under the Constitution of the United States, to grant the public lands by law.

The company, however, has made applications, which have not been admitted, to select, in granted and indemnity limits (Marysville lists), 79,474.40 acres, and there are pending in the General Land Office on admitted selections 22,709.12 acres on account of the deficiency of the first 151.33 miles.

The company has also applied to select in the Shasta district, opposite the forty miles of road accepted by President Arthur, 387,148.79 acres; but the selections have not been allowed, principally because of the letter of the Commissioner of June 26, 1885.

From the refusals of the local officers to admit selections tendered, appeals have been taken to the Commissioner, and these remain unacted on in the files of his office.

| | Acres. |
|---|---|
| The suspensions upon old lists of selections made at Marysville and Shasta amount, upon computation, to | 41,312.77 |
| Add Marysville list of admitted selections | 22,709.12 |
| " " " rejected " | 79,474.40 |
| " Shasta " admitted " | 14,596.73 |
| " " " rejected " | 387,148.79 |
| Total | 545,241.81 |

The company has proceeded according to law and regulations as far as possible thus to obtain title to over 500,000 acres, but these lands are not all that are due on account of the 191.33 miles of road now completed and accepted, without taking into account the sixty miles now under examination and report by commissions appointed by the President.

## III.

The United States, in section 5 of the law of grant, proposed to secure certain benefits.

These are: The transportation of mails, the transmittance of dispatches, the preference in the use of railroad and telegraph, the maintenance of the railroad as a highway for the use of the government of the United States *free of all toll or other charges* upon the transportation of the property or troops of the United States, and the acquisition of the right to have these transported over the road "*at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States.*"

The government is claiming, in part at least, and receiving, as far as claimed, the advantages of these conditions in its favor along the completed portions of the roads; and, as the road will soon be completed to a junction with the road of the Oregon Company, the government will soon receive much greater benefits in transportation of mails and troops between Sacramento California, and Portland Oregon. Yet, whilst claiming and receiving such benefits, the government is refusing to the company that evidence of title to its lands which the law says it shall have.

This is a very great injury to the company, and of no benefit whatever to the government. It cannot be supposed that the company takes no measures to protect itself against such a policy of the government—a policy which since its introduction has tended, and still tends, to unsettle land titles, to fill the courts with suits involving title and posses-

sion of lands, and to promote bitterness and ill-will among neighbors, who are forced into unwilling litigation and despoiled of their property to pay the expenses of protracted contention.

IV.

That our method of computing the quantity of the grant is correct we here respectfully refer to an exposition of this grant given in 1878, when it first came under judicial cognizance, given by a very eminent judge, whose jurisdiction in the United States circuit court for the ninth circuit extends over the lands granted to and withdrawn for this company.

In his decision in the case of Ryan *v.* The Central Pacific Railroad (a decision which was affirmed at the October term, 1878, of the United States Supreme Court after the United States had intervened, and was heard on brief and oral argument by its Attorney General, 99 U. S. Sup. Ct. Rep., 382) the circuit judge said (the land in controversy being the southeast ¼ of section 3, township 16 north, range 2 west, Marysville district, Cal'a):

Congress manifestly designed the grant to be for the full amount of land indicated, and the only object of any exception at all of the classes mentioned was to prevent interference with rights existing in others. The exception was not designed *to limit the grant*, but to avoid disturbing substantial rights already vested and still existing; and, that the company might get its full quantity, Congress authorized it to make up any deficiency by reason of any prior right that might have attached to any lands specifically designated by selecting other lands outside the designated limits. The intention was to give the full amount of land designated, and the only care of Congress was not to interfere with rights already vested and still existing. The right to the lieu lands only attached on the selection, and at that time there was no conflicting interest. All reason for any exception at all had ceased to operate. Any less favorable construction would practically nullify this grant along a large portion of the line, or any other grant in similar terms throughout a large portion of the State.

* * * * * * *

The grant now in question was intended to be substantial, not a mere delusion; and the act should be construed as it was intended to be understood by Congress at the time it was passed, and not as it may suit the convenience or interest of parties who come in seeking the advantages resulting from the construction of the road after its completion under the act, by the parties who built it relying upon this grant. Any construction which shall deprive the defendant of the lands which it reasonably had a right to expect under the act of Congress would wrongfully wrest from it, by judicial sanction, a large portion of the consideration which formed the inducement to the undertaking." (5 Sawyer's Rep., pp. 264, 265.

We may add that the construction of the indemnity provisions in the grant was a subject of consideration and decision by the Department in March, 1880. The Commissioner of the Land Office, in submitting to the Secretary of the Interior for approval Marysville list of indem-

nity lands No. 11, containing 67,230.85 acres, made a report, dated March 16, of which a copy will be found (No. 4) in the appendix.

This list the Secretary approved March 18, 1880. The Commissioner, in a later report, 21st May, 1880, advised the Secretary that he (the Commissioner) construed the approval of the list as "the decision of the Department upon the points submitted and as constituting the rule governing the action of the General Land Office in similar cases." (See No. 5, appendix.)

The Department thus having made its decision and settled its practice in conformity to the opinion of the United States circuit judge having jurisdiction of the lands, and it appearing that the company is not likely to obtain all the lands of its grant if a final settlement thereof is reached, it is demonstrated that the withdrawn lands ought, according to the intention of Congress and the purpose of the withdrawals, to remain so withdrawn until a final settlement of the grant.

Very respectfully,

HENRY BEARD,
*Attorney for the California and Oregon Railroad Co.*

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CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR:—Now comes the Chicago, St. Paul, Minneapolis and Omaha Railwap Company, by its counsel, and answering the rule entered by you upon said Company, on May 23rd 1887, and returnable June 27th 1887, to show cause why its existing indemnity withdrawal "should not be revoked and the lands therein embraced restored to settlement," respectfully shows:

First:—That by Acts of June 3rd 1856 (11 Stats. 20), and May 5th 1864 (13 Stats. 66), Congress granted lands to the State of Wisconsin to aid in construction (*inter alia*) of a railroad from the St. Croix River or Lake to the West end of Lake Superior and Bayfield. The original grant was of six odd sections per mile on each side of the road, with right to select other lands within fifteen mile limits as indemnity for lands found on definite location to have been—

"sold, or otherwise appropriated, or to which the right of pre-emption has attached."

The grant of 1864 increased the quantity to ten sections per mile on each side of the road, with similar right to select indemnity within a larger limit of twenty miles for lands within the grant in place found on definite location to have been—

"sold, or otherwise appropriated, or to which the right of pre-emption or homestead has attached."

Second:—These grants were accepted by the State, the road duly located, since fully constructed by the Northern Wisconsin R. R. Co., and the present Company as its successor by consolidation, and the grants thereby fully earned.

Third:—Lands have been selected by this Company and its predecessors in interest from the indemnity belt to compensate losses ascertained within the grant in place, lists whereof are now pending in the General Land Office. Same are as follows:—

| | Acres. |
|---|---|
| May 19th 1875 | 105,951.62 |
| May 22nd 1875 | 58,508.61 |
| November 4th 1882 | 25,544.48 |
| May 12th 1883 | 81,335.48 |
| May 12th 1883 | 61,887.52 |
| June 12th 1883 | 18,523.40 |
| February 16th 1885 | 3,842.20 |
| March 10th 1885 | 37,087.14 |
| " " " | 9,119.02 |
| April 30th 1887 | 50,588.60 |
| Total | 452,388.07 |

Fourth:—Since the original selections in 1875, the Company has diligently sought to secure adjustment of its selected indemnity lands. The General Land Office refused to make either adjustment or conveyance, solely because the road was not seasonably constructed. By official report suits both civil and criminal were recommended by the Commissioner for alleged trespass on the part of its officers and purchasers for cutting timber on these selected lands. March 22nd 1887, (5 L. D., 511), you ruled thereon thus:—

"I therefore decline to concur in your recommendations to the Attorney General, but, on the contrary, I have to direct that you cause said railroad grant to be forthwith adjusted, and transmit for my approval, in the customary form, proper lists of lands subject to selection and selected by said Company, within the indemnity limits of said grant."

Fifth:—Such adjustment is now being made in the General Land Office, and the results thereof will be very shortly, and as directed, certified to you. Various questions of law will arise thereon materially affecting the quantity of indemnity lands due under the grant, requiring consideration and decision by you before any final adjustment can be reached.

Sixth:—The Company has selected sufficient lands to compensate its estimated losses. It has therefore no objection to the present revocation of the existing indemnity withdrawals, *provided* the same shall in clear terms except from such restoration all *selected* lands pending the final adjustment of its grant now in progress and far advanced.

Respectfully submitted,

BRITTON & GRAY,
*Attys for C. St. P. M. & O. R. R. Co.*

DALLES MILITARY ROAD CO.

THE DALLES, OREGON, *June 17th* 1887.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR:—I send you a preamble and resolution adopted by the Dalles Military Road Company assenting to the proposition of the Secretary of the Interior to restore to the public domain for settlement the lands within the indemnity limits of the grant made by Congress to the state of Oregon on the 25th day of February 1867 to aid in the construction of a wagon road from The Dalles on the Columbia river to Fort Boise on Snake river.

Some three or four years ago the Dalles Military Road Company through its secretary addressed a communication to the late Commissioner of the General Land Office requesting him to designate in what manner this Company should select the lien lands to which it was entitled. No answer was made to that communication and no acknowledgement was ever made that it had been received at the General Land Office.

The Dalles Military Road Company has been anxious for some years past to have the indemnity lands restored to the public domain as expressed in that communication for the reason that it would be beneficial to the Company to have settlers thereon. And it has often requested the Registers & Receivers to permit settlers to file homestead or preemption entries thereon of which privilege many persons have already availed themselves.

While this Company has been thus willing and anxious that these lieu lands (or as they are termed indemnity lands) should be restored to the public domain for settlement it yet reserves the right given to it by the act of Congress to select from the lands, so restored so much thereof as will make up any deficiency in the lands granted by the act of Congress.

And the Company again most respectfully requests that the Land Department may give such instructions to the Registers and Receivers of the several local land offices as will enable the Dalles Military Road Co. to make the necessary selections.

Respectfully your ob't servant.

JAMES K. KELLY,
*Pres't D. M. R. Co.*

At a special meeting of the Board of Directors of the Dalles Military Road Company, held at their office in Dalles City, Wasco County, Oregon, on Thursday, the 16th day of June A. D. 1887. Present, Col. James K. Kelly, Presiding, Hon. O. S. Savage, and C. N. Thornbury, Secretary. All of the members of the said Board of Dirextors being present, the following proceedings were had:

Whereas:—The President of the Dalles Military Road Company has been notified by the Hon. Secretary of the Interior, to show cause, on

or before the 28th day of June, A. D. 1887, why the order withdrawing certain lands as indemnity lands, dated December 14, 1871, should not be revoked:

And Whereas:—The Dalles Military Road Company are only awaiting instructions from the Hon. Commissioner of the General Land Office as to the proper method of selecting the said lands:

And Whereas:—There is but a comparatively small amount of acreage for which the said Dalles Military Road Company are entitled to lieu:

*Therefore Resolved*:—That the Dalles Military Road Company hereby assent to the proposition of the Hon. Secretary of the Interior, to restore to the public domain in the lands within the indemnity limits of the grant made by the United States to the State of Oregon on the 25th day of February, A. D. 1867, by virtue of an Act of Congress entitled "An Act granting lands to the State of Oregon to aid in the construction of a Military Wagon Road from Dalles City on the Columbia River, to Fort Boise, on the Snake, River," "approved February 25th, A. D. 1867, and which lands were granted by the State of Oregon, to the Dalles Military Road Company.

But this Company reserves all the rights given to it by law to select such indemnity lands as it is entitled to within such indemnity limits, after the restoration of such lands to the public domain; but not so as to interfere with the rights of any settler thereon.

JAMES K. KELLY,
*President.*

CALEB N. THORNBURY.

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FLINT AND PERE MARQUETTE R. R. CO.

EAST SAGINAW, MICH., *June 22d*, 1887.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior, Washington, D. C.*

SIR: The notice issued by you May 23, 1887 and served on one of the directors of this company, to show cause on or before June 27, 1887, why the orders of withdrawal from settlement of the lands within the indemnity limits of this road should not be revoked, has been brought to my attention—We do not know that we are interested in this matter, and were not aware that any such orders of withdrawal affecting us or our lands are still in force—

The records in your Department will show that the agent of the State of Michigan many years ago made application for *all* the vacant and unappropriated lands on the odd numbered sections within the fifteen mile limits of our road, and that after taking all such lands we fall short nearly 150,000 acres of receiving the grant six sections of land per mile of our line of road from Pere Marquette to Flint—We of course have and make no claim for such deficiency, and the fact that

such deficiency exists is only stated to show our rights to *all* the land in the odd-numbered sections within the fifteen mile indemnity limits of our grant, and if this be conceded this Company cannot be affected so far as we know by the proposed revocation of the orders of withdrawal—

There are a number of parcels of lands within the limits of one grant, some within the six and some within the fifteen mile limits of our grant which we have made application for at the Local Land offices, in addition to the general application made by the agent of the State referred to above, which parcels we presume are recognized by the Department as within our grant, but as yet we have not received from the Department the customary evidence of such recognition and would be glad to receive certified lists of such parcels. I presume our applications have been reported by the local Land officers but for some reason have been over-looked, or if not over-looked, the usual certificates have failed to reach us—If our applications are not on file in the Department we will be pleased to send lists of the parcels so applied for and not yet certified to us—

Very Respectfully

A. W. NEWTON
*Land Com. F. & P. M. R R Co.*

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FLORIDA RAILWAY AND NAVIGATION CO.

FERNANDINA, FLORIDA, *June* 20, 1887.

To the SECRETARY OF THE INTERIOR,
*Washington, D. C.*

The undersigned, as trustee for the holders of certain bonds herein mentioned, taking notice of the Rule issued from the Department of the Interior under date May 23rd, 1887, returnable on the 28th day of June, 1887, requiring, among other Corporations, the Florida Railway and Navigation Company to show cause why orders withdrawing lands from settlement under the public land laws, within indemnity limits along the road of said Company, (among others), should not be revoked or such other action be taken as may speedily restore such lands to the public domain for settlement; and claiming the right to be substituted for said Company and to be heard upon the said Rule touching the interest of the said trust estate, respectfully submits the following statement:

The United States granted to the State of Florida the odd sections for six miles on each side, and the indemnity land for fifteen miles on each side, of a railroad to be built from Amelia Island to Tampa Bay with an extension to Cedar Key, for the purpose of aiding in the construction of such railroad. (Act of May 17th 1856, 11 Stat., 15.)

Before the grant was made the State of Florida had given to the Florida Railroad Co. its charter to build a railroad on the very route

named in the act of Congress, and had passed the "Internal improvement law," in which that route was designated as one of the roads proper to be aided by the State, and one of those which should constitute the Internal Improvement System of the State. (Charter of the Fla., R. R. Co. Laws of Fla., Chaps. 482 & 729. Int. Imp. Act, Laws of Fla. Chapt. 610 S. 4.)

The Florida R. R. Co. under the provisions of Section 5 of the Internal improvement act accepted the terms and conditions of the act and thereby under Section 21 of the act became the beneficiary of the United States grant.

On the 2nd of May 1856, the Fla. R. R. Co. made its trust deed conveying to trustees by way of mortgage, the said Company's road then constructed and thereafter to be constructed, and certain lands specifically designated and all other lands then owned by the Fla. R. R. Co. or which might thereafter be granted to it along the line of its railroad, either by the State of Florida or by the United States. This trust deed was made to secure the payment of an issue of 8% coupon bonds (called Freeland bonds) of said R. R. Co., of which about one hundred and fifty thousand dollars (of principal) are outstanding, and are claimed to be a lien on the lands granted by the Act of Congress May 17th 1856, lying South of Waldo.

The trust deed provides that the trustees shall in case of default of the Company in its said obligations take possession of the property embraced in the deed and dispose of it for the benefit of the bond-holders. The trust deed was duly recorded.

The State of Florida by the U. S. grant became a trustee for the Fla. R. R. Co. The title to the lands went to the State but the equitable right went to the Company. The State simply held the lands for the use and benefit of the Company. (Van Wyck *v.* Knevals 106, U. S. 365.)

The Company having made its trust deed in the nature of a mortgage prior to the U. S. grant, its equitable interest passed by the operation of the law immediately upon the making of the U. S. grant into the Trustees, for the purposes of the deed, not resting a moment in the Company. A mortgage can be made on property to be afterwards acquired. (1 Wall. 263. 268–8; 2 Wall. 481; 23 How. 123 &c.)

By 1860, or about that time the entire route of the Fla. R. R. from Amelia Island on the Atlantic to the waters of Tampa Bay with a branch to Cedar Key was located and a map thereof showing the line of the road built and to be built, was filed by the Company in the proper office in Washington. The granted lands within the six mile limit thereby became identified; the title vested and related back to the date of the grant and those particular lands became subject to the burden of the trust deed which had been imposed upon them. (112 U. S. 720; 106 U. S. 360; 103 U. S. 739; 97 U. S. 491.)

As to the indemnity lands, no title can be acquired in any specific tract until actual selection is made. (112 U. S. 414, 720; 110 U. S. 27.)

I am informed that neither the Fla. R. R. Co. nor any successor to it, in name or right, has made such selection, and I, as trustee, have, by the local U. S. land offices, been refused permission to make the selections.

In 1866 the trustee of the internal improvement fund of the State of Florida, acting under the provisions of the internal improvement act (section 3), made a sale by which persons having interests adverse to the trust which I represent claim that so much of the said railroad as lies between Fernandina and Cedar Key (being all which at that time had been completed) and the franchise of the Company were transferred to Edward N. Dickerson, and his associates, as their absolute property free from the lien of the said trust deed.

It is not claimed by such persons that the internal improvement act gave any lien on any lands of the Company except its roadway, depots and stations, nor that any other real estate passed by said sale. Their claim and position as I understand them are (I) That the franchise of the Florida Railroad Company was purchased as above stated by E. N. Dickerson and his associates, and by them and their assigns was conveyed until through such transfers it has become the property of the Florida Railway and Navigation Company.

(2) That the Florida Railway and Navigation Company and its immediate predecessors and assignors since 1866 having built 150 or more miles of the original located route, additional to what had been built previous to 1866, to wit: from a point called Waldo, southward in the direction of Tampa Bay that (3) the above parties, builders of said 150 or more miles of said railroad are entitled to all the granted lands lying on said 150 or more miles of road by virtue of the act of Congress of May 17th 1856, free and discharged from all liens created by the Fla. R. R. Co., (4th) that they derive their said right or claim through the Fla. R. R. Co. by assignment under authority of Section 4 Acts 1855, Chapt. 729, of laws of Fla. (5th) They say that such assignment of the right to build the portion of road South of Waldo was made by the Fla. R. R. Co. after the alleged sale in 1866, by the trustees of the internal improvement fund, of said Company's franchise, to wit: about the year 1876

It has been ascertained (see H. Ex. Doc. No. 144, 47th Cong. 1st Sess.) that under the act of May 17th 1856, 305,000 acres more of land have been earned by the construction of the road between Fernandina and Cedar Key than have been approved to the State.

This deficiency cannot be made good from lands along the said portion of railroad. It must therefore be made good, if at all, from lands lying elsewhere on the chartered route of said company's road, and I as trustee aforesaid, am seeking the deficient lands South of Waldo and outside of the six mile limit.

By chap. 3, 152 laws of Fla. of 1879, the State granted and confirmed to the purchasers and transferees from the several R. R. Companies which accepted the provisions of the Internal Improvement Act, and

their assigns, the lands and titles thereto which were granted to the State of Fla., by the U. S. May 17th 1856.

My predecessors in the said trust to secure said Freeland Bonds were the transferrees from the Florida Railroad Company of all the lands granted by the United States, for the benefit of that company's road, and if such legislation was needed to divest the State of its legal title in those lands the said trustees were clothed with it thereby.

I have traced the claim which as trustee I make to the said lands South of Waldo. I will consider now the objections to it urged by the Florida Railway and Navigation Company, and by the local land offices in refusing me the use of the official plats and books to make selection of indemnity lands.

I. The Florida Railway and Navigation Company, says that the franchise of the Florida Railway Company to earn and take the lands South of Waldo by building a railroad on that portion of the route was sold in 1866 by the trustees of the internal improvement fund of Florida to E. N. Dickerson and associates and that through them it has come to the same Florida Railway and Navigation Company.

There has been but one judicial interpretation made of the effect of such action as was taken by the trustees of the Internal Improvement Fund in 1866, against the Florida Railroad Company: That interpretation was given in the bankruptcy case of Rankin & Pulliam *v.* the Florida, Atlantic and Gulf Central Railroad Company, by Judge Fraser of the United States district court for the Northern District of Florida. (See National Bankruptcy Register, Vol. 1, second edition, Page 657.)

In no other case has the said action of the trustees of the internal improvement fund come directly before the court so as to be made the subject of authoritative judicial opinion, and if, in any other case, any opinion upon the effect of the said sale has been pronounced it is *obiter dictum.*

Judge Fraser held that the effect of such sale under the third section of the internal improvement act of Florida was not to dissolve the corporation but only to effect a change of stock-holders, leaving the debts and duties of the company unaffected. He says in his opinion: "The sale by the trustees is a mode of assignment agreed upon between the State and the corporation and in virtue of such sale the purchasers become the assigns and successors of the original stock-holders, succeeding to all rights, powers, duties and liabilities of said stock-holders as a corporation."

If this be a correct position, E. N. Dickerson and associates and their assigns by whatever name called, stood and stand in precisely the same relation to the deed of trust above mentioned as the Florida Railroad Company stood in, previous to 1866. To show that such was the view taken by parties concerned in the old sale by the trustees of the Internal Improvement Fund of Florida, and in the said Railroad since the sale, I cite the facts, 1st, That E. N. Dickerson and associates purchasers as alleged of the franchise and railroad of the Florida Railroad

Company, conveyed the said franchise and railroad back to the Company which continued (and which under changed name still continues) to exercise all its corporate powers without any re-incorporation or other enabling act of the Legislature.

A valid sale of a corporation's franchise under a statutory power, no provision being made for the continued existence or resuscitation of the corporation would dissolve the corporation. E. N. Dickerson and associates, if they had acquired the Florida Railroad Company's franchise could not have restored it to the Company by a deed of conveyance.

2nd. That the State of Florida recognized the continued existence of the Florida Railroad Company after 1866. For instance, in 1870, the Legislature, by chapter 1795, put "certain restrictions on the Florida Railroad Company", and authorized it to create a separate capital stock for the uncompleted portion of the route; and in 1872, by chapter 1795, it changed the name of the company to "Atlantic Gulf & West India Transit Company."

3rd. That in 1876, and at other times afterwards, the Florida Railroad Company, by its new name of the Atlantic, Gulf & West India Transit Company, assigned to the Peninsular Railroad Company, and to the Florida Tropical Company, the right to build the portion of its chartered route lying South of Waldo.

II. The Florida Railway & Navigation Company says that the Peninsular Railroad Company, and the Florida Tropical Railroad Company, and itself (which has merged with the other two companies, and with the Florida Railroad Company under its changed name,) having built the constructed portion of the originally chartered route South of Waldo, it, the said Florida Railway & Navigation Company, is entitled to all the lands along said portion of the route, under the congressional grant and is entitled to them free from the lien of the trust deed of May 2nd, 1856. This claim is made and attempted to be supported, (inconsistently with the position reviewed in paragraph number 1.) under the provisions of section 4 chapter 729, Laws of Florida, passed December 14th 1855, which permits the Florida Railroad Company to "set off any portion of its line to persons desirous of constructing the same, and in that event such portion may have a distinct organization with all the grants, rights, duties and privileges conferred on the Florida Railroad Company, with the right to adopt a different name in order to keep the stock account and liabilities separate." But before the Florida Railroad Company set off any portion of its route under this power, it had, to secure its Free-land bonds, conveyed in trust, as already stated, its entire route, the road built and to be built, and all lands which it might receive by Congressional or State grant. That conveyance was duly recorded; the lien was created and vested in the trustees named in the conveyance and could not afterwards be divested by these voluntary assignments. The assignees took the assignment of right to build *cum onore*. They simply stand in the place of the Florida Railroad Company, with the same rights and duties as that company had. The Florida Railroad Company could

not set over and assign what it did not have. It could not create in an assignee a right which it did not itself possess. It certainly did not have a right to build any portion of its route itself free and discharged from the lien and burden of that trust deed. Section 4 of the Act, chapter 729, is not susceptible of any other interpretation.

I will go back to the sale, by the trustees, of the internal improvement fund, made in 1866, and, for the sake of this line of argument, admit that the sale was a foreclosure of the statutory lien (instead of, as I contend, the exercise of a separate and independent power having no relation to the statutory mortgage), and that the purchasers took an absolute title to and property in all things mentioned in the 3d section of the act as being subject to the lien. What are those things? The act says, "All bonds issued by any railroad company under the provisions of this Act shall be a first lien or mortgage on the road bed, iron, equipment, workshops, depots, and franchise". No lands of the company are included except road bed, workshops, and depots; consequently even under this second view of the legal effect of said sale, the lands granted by the United States were unaffected by the sale The lands along the entire route of the company's road built and to be built, within the primary limits, had before 1866 vested in the State for the Florida Railroad Company, subject only to the power of defeasance by the grantor, the United States, if the road should not be built and if the United States should choose to exercise such power: they had been conveyed in trust by the company, as it had a right to do, to trustees, and the title to 595,000 acres had been made absolute by the said company's construction of the road from Fernandina to Cedar Keys. Only 290,000 acres could be found on that portion of the road. Must the company, or its creditors who furnished money to build the 155 miles between Fernandina and Cedar Key, lose the 305,000 deficient acres? No, the deficiency can be taken outside of the primary limits, on other portions of the line South of Waldo, whether the road be built or not built. This right exists, whatever other rights may have attached to the lands within the primary limits south of Waldo.

In this position I am, it seems, sustained by the opinion of Mr. Edward N. Dickerson, of New York, a lawyer of deserved distinction, formerly and for several years the President of the Florida Railroad Company, and familiar with the points of law affecting such company and its lands. In his answer to a suit in equity, pending in the United States Circuit Court for the Northern District of Florida, between S. I. Wailes, complainant, and the Florida Railway & Navigation Company, *et al.*, he says:

"3d. There was a land grant appurtenant to the road from the United States and the State of Florida, but when the road was completed (between Fernandina and Cedar Keys) all the land to which it was entitled under the statutes had not been acquired by the company because it was not to be found in the ownership of the State or of the United States on the line. What was wanting, however, under the

law might be acquired under the title of indemnity lands, and be taken from the public lands situated elsewhere, under proper restrictions."

"25. In respect to the indemnity lands referred to in the agreement of October 24th 1879, neither the Tropical Railroad Company, nor the purchasers of the Florida Railroad, under whatever name, have any interest whatever. Those lands are assets of the old Florida Railroad Company for the payment of its Freeland mortgage debt, or other debts, many of which stand in judgment."

"29th. I also know that the Florida Railway & Navigation Company has no interest whatever in the indemnity grant of lands, as Wailes perfectly well knows, and that any claims in respect to them must be settled with the old Florida Railroad Company, and he has been instructed by the old Florida Railroad Company to keep separate those indemnity lands from the railroad lands, because they belong to an entirely different account and to different owners."

The language of the deed of conveyance from the Trustees of the internal improvement fund of Florida to E. N. Dickerson and associates, conveying the Florida Railroad and "all its property of every kind" has been quoted against the claim which I assert as trustee for holders of Freeland bonds. I reply that of course the trustees of the internal improvement fund could only sell and convey what the act gives them authority to sell and convey. The words quoted are found in the 3rd section of the act, and the deed only follows the language of the act. But those general and very comprehensive words "all its property of every kind" are by a familiar rule of construction restricted by the preceding language of the section giving the lien, the rule being that "where a particular class (of persons or things) is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive and the general words treated as referring to matters *ejusdem generis* with such class." The legal effect of the deed is controlled by this principle and, as I have stated, the lands granted by the State and United States are not embraced in the sale by and conveyance from the trustees of the internal improvement fund.

Having thus shown the claim and interest which, as trustee, I assert to the indemnity lands on the line of the Florida Railroad and Navigation Company's Road, and inasmuch as the local land offices have not recognized my right as such trustee, to make the selections, I respectfully ask, if the said Corporation has not yet done so, that I, as such trustee, may be allowed to select said indemnity lands for the benefit of my said trust estate; that a reasonable time be prescribed within which such selections may be made and that the local land officers be instructed to extend us all facilities for the work.

All of which is respectfully submitted.

SAMUEL A. SWANN,
*as Justice &c.*

E. M. LENGLE
C. P. & J. C. COOPER
*Attys. for S. A. Swann, Justice &c. of Jacksonville, Fla.*

GULF AND SHIP ISLAND R. R. CO.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR: The Gulf and Ship Island R. R. Co., by its counsel, for answer to the rule entered by you upon said Company on May 23, 1887, to show cause on or before the 28th day of June, 1887, why its existing indemnity withdrawal should not be revoked and the lands therein embraced restored to settlement, respectfully shows:

First:—That by act of Congress approved August 11, 1856 (11 Stats., p. 30), Congress granted to the State of Mississippi to aid in the construction of a railroad from Brandon to the Gulf of Mexico every alternate section of land designated by even numbers for six sections in width on each side of said railroad, with the right to select within the larger limit of fifteen miles other lands in lieu of such within the grant as were found on definite location of the line or route of the road to have been sold or to which the right of preemption has attached.

Second:—The State of Mississippi, by act of its legislature, approved February 2, 1857, accepted said grant, and by act of its legislature approved December 3, 1858, granted said lands to the Gulf and Ship Island R. R. Co.

Third:—A map of definite location of said road was filed in the local office at Jackson, Mississippi, on November 23, 1860, and in the General Land Office November 27, 1860.

Fourth:—Said map of definite location was accepted by the General Land Office on December 3, 1860.

Fifth:—On August 9, 1856, the lands within both the granted and indemnity limits were withdrawn from sale or entry. But about 1865 this withdrawal was ignored by the Government and a large amount of lands within the grant were sold by the Government. As to these lands the Company was entitled to insist upon its prior right *or* to select other lands in lieu thereof. In order not to disturb settlers who had taken up the lands under the action of the General Land Office, it adopted the latter course and on June 24th and July 1st, 1884, filed in the General Land Office a formal relinquishment of its claim to the lands thus erroneously sold. Following this and on July 11th, 1884, the order of withdrawal was renewed and has since continued in force.

Sixth:—That pursuant to the direction of the Statute, the Company, through the agent of the State appointed by the Governor thereof, has made selection in lieu of lands found within the grant in place to have been sold or taken by pre-emption. Such lists on submission here were found to be technically defective and in order to complete same the Company has caused them to be returned to Mississippi. The required corrections and amendments are now being made and the lists will shortly be returned to the General Land Office with all statutory and official requirements fully complied with.

Wherefore, and on return of such perfected selections, this Company has no objection to the revocation of said order of withdrawal, provided the same shall in clear terms except from such restoration, all *selected* lands contained or to be contained in such perfected lists until the final adjudication by you of such lists.

Very respectfully,

R. W. BALDWIN,
BRITTON & GRAY,
*Attorneys for Gulf & Ship Island R. R. Co.*

JUNE 28, 1887.

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HASTINGS & DAKOTA RY. CO.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR—Now comes the Hastings and Dakota Railway Company, by its counsel, and answering the rule entered by you upon said Company, on May 23rd 1887, to show cause why its existing indemnity withdrawal "should not be revoked, and the lands therein embraced restored to settlement" respectfully shows:

First:—By Act of July 4th 1856 (14 Stats. 87) Congress granted lands to the State of Minnesota to aid (inter alia) construction of a railroad "from Hastings, through the counties of Dakota, Scott, Carver, and McLeod, to such point on the Western boundary of the State as the legislature of the State may determine."

Second:—By appropriate State legislation the grant was accepted, the Western termini fixed, and the grant transferred to this Company.

Third:—The grant was of odd sections "to the amount of five alternate sections per mile on each side of said road" with the right to select other odd sections within a larger limit of twenty miles, as indemnity for lands granted in place, but found on definite location to have been "sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached."

Fourth:—The railroad was duly located, has been fully constructed, and the land grant fully earned.

Fifth:—The length thereof is 202.1 miles, and the estimated quantity of the grant is 550,000 acres. (Copp's Land Laws, Ed. 1875, p. 353.) There has been conveyed to the State for the Company, 312,770.27 acres. Difference, 237,229.73 acres.

Sixth:—But little of the grant in place remains to be conveyed. The above difference must therefore be secured if at all, from the indemnity lands.

Seventh:—The Company has pending the following lists of selections, whereon all Statutory fees have been paid or tendered, and all legal

requirements complied with. Same embrace all available lands within the indemnity limit.

| | Acres. |
|---|---|
| December 23rd 1881 | 362. |
| May 28th 1884 | 111.55 |
| May 26th 1883 | 68,562.83 |
| July 28th 1886 | 640. |
| December 21st 1886 | 2,157.63 |
| Total | 71,834.01 |

as against an estimated difference of over 200,000 acres.

Eighth:—These selections have remained of record in the General Land Office without action, pending an adjustment of the grant which this Company has not yet been able to obtain.

Wherefore, having selected all available lands and the grant being still largely deficient, the Company makes answer that it has no present objection to the proposed revocation of its indemnity withdrawal *provided* the lands so selected and applied for as shown by its pending lists be withheld from settlement and entry until the final adjustment of its grant. The time for such adjustment remaining wholly within the pleasure of the United States, until it is finally determined what lands the Company has lost, the present apparent large deficiency in its grant should protect the lands covered by its pending selections from adverse appropriation.

Respectfully submitted,

BRITTON & GRAY,
*Attys. for H. & D. R'y. Co.*

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MARQUETTE, HOUGHTON AND ONTONAGON R. R. CO.

WASHINGTON, D. C., *June 27th*, 1887.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR:—Now comes the Marquette, Houghton and Ontonagon Railroad Company, and answering the rule entered by you upon said Company on May 23rd 1887, and returnable June 27th 1887, to show cause why its existing indemnity withdrawal "should not be revoked, and the lands therein embraced restored to settlement", respectfully shows:—

First:—That by Act of June 3rd 1856 (11 Stats. 21) Congress granted lands to the State of Michigan to aid in the construction (*inter alia*) of a railroad "from Little Bay de Noquet to Marquette, and thence to Ontonagon." The grant was of six odd numdered sections per mile on each side of the road, with right to select other lands within larger limits of fifteen miles for lands within the grant in place which were found on "definite location to have been sold, or otherwise appropriated, or to which the right of pre-emption has attached."

Second:—By Act of Congress approved March 3rd 1865, (13 Stats. 520), the grant of 1856 was increased by "four additional sections of land per mile."

Third:—That by appropriate State legislation this grant became vested in and is now owned by the Marquette, Houghton & Ontonagon Railroad, whose ownership is also recognized by the federal Act of March 3rd 1865 *supra.*

Fourth:—The entire road was definitely located and has since been constructed from Marquette to L'Anse, a distance of 72 miles. The lands within both granted and indemnity limits were duly withdrawn and since so remain.

Fifth:—There has been conveyed to the State for the Company 565,411.30 acres. (Report of General Land Office, 1884 p. 54.)

Sixth:—The Agent of the State duly appointed by the Governor thereof, has made formal application to select indemnity for lands lost within said grant as follows:—

| | Acres. |
|---|---|
| September 17th 1883 | 173,560.19 |
| October 8th 1883 | 65,088.29 |
| July 26th 1884 | 809.40 |
| August 14th 1884 | 18,307.02 |
| Total | 257,774.90 |

These lists were forwarded by the Register of the Marquette Land Office as presented, to the Commissioner of the General Land Office for instructions. No action thereon has ever been taken here.

Seventh:—The entire grant is still in existence, no forfeiture having ever been declared. Thereunder selection has been made to compensate losses in the grant in place. Lists thereof are now pending as above stated, awaiting official action.

Wherefore this Company has no objection to the present revocation of existing indemnity withdrawal, *provided* same shall in clear terms except therefrom all *selected* lands pending final official determination of the losses in place and ascertainment of the amount of indemnity due therefor. Such selections have been made by the agent of the State in precise accord with the direction of the granting act which distinctly provides that if on definite location it shall *then* be found that of the lands granted any have therefore been disposed of, the Governor of the State by his duly appointed Agent shall *then* make selection to compensate such losses. This having been done it is respectfully insisted that until the correctness or incorrectness of such selection have been tested by such final official determination of losses within the grant in place, the lands embraced in such selections should be withheld from adverse appropriation.

Very respectfully,

BRITTON & GRAY,
J. H. CHANDLER,
*Attys. for Marquette, Houghton, and Ontonagon Railroad Co.*

## MISSOURI, KANSAS AND TEXAS RY. CO.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR:—Now comes the Missouri, Kansas and Texas Railway Company, by its counsel, and answering the rule entered by you upon said Company on May 23, 1887, and returnable June 27th, 1887, to show cause why its existing indemnity withdrawal "should not be revoked, and "the lands therein embraced restored to settlement", respectfully shows:—

First:—By Acts of March 3, 1863 (12 Stats. 772), July 1, 1864 (13 Stats., 339), and July 26th, 1866 (14 Stats., 289), Congress granted lands to the State of Kansas to aid in the construction of a railroad from Fort Riley (Junction City) Kansas, down the Neosho Valley, to the south line of the State.

Such grant was of ten alternate odd sections per mile, with right of indemnity selection within twenty mile limits, in lieu of lands within the grant in place, found on definite location to have been "sold, re-"served or otherwise appropriated, or to which the right of homestead "settlement or pre-emption has attached."

Second: The grants were conferred by the State upon the Union Pacific Co., Southern Branch, now known as the Missouri, Kansas and Texas Railway. The route was definitely located—the road seasonably constructed and the grant thereby fully earned.

Third: The length of such constructed road is 182.50 miles.

| | Acres. | Acres. |
|---|---|---|
| The estimated quantity of the grant thereon was (Copp L. L., p. 353). .. | | 1,520,000 |
| There have been conveyed thereunder | 983,945.96 | |
| Of which title was vacated by the Supreme Court on suit of U. S. (82 U. S., 733), to | 186,936.72 | |
| Leaving patented | | 797,009.24 |
| And deficient in the grant | | 722,990.76 |

(General Land Office Report 1885, P. 191).

Fourth: To satisfy this deficiency the Company has selected every available acre within the indemnity belt. Selections are now pending aggregating but 5,758.62 acres, and were made as follows:—

| | Acres. |
|---|---|
| October 11, 1887 | 533.10 |
| October 22, 1877 | 198.20 |
| June 2, 1879 | 518.20 |
| June 26, 1879 | 160.00 |
| June 1, 1881 | 615.70 |
| September 1882 | 1920.00 |
| September 1882 | 343.80 |
| January 24, 1884 | 40.00 |
| September 16, 1884 | 16.52 |
| November 17, 1885 | 1413.10 |
| | 5758.62 |

Wherefore—having selected all available lands, and the grant being still deficient more than one half of the promised quantity whereon the grantee constructed the road, the Company makes direct answer that it has no objection to the proposed revocation of its indemnity withdrawal, *provided* the lands now selected as shown by its pending lists be withheld from settlement and entry until the final adjustment of the grant. The time for such adjustment remains wholly within the pleasure of the United States. Meanwhile the great deficiency in the grant should protect the lands covered by the pending selections from adverse appropriation.

Respectfully submitted,

BRITTON & GRAY.
*Attys for M. K. T. R'y. Co.*

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MOBILE AND GIRARD RAILROAD CO.
OFFICE TREASURER,
*Columbus, Ga., June* 14, 1887.

Hon. L. Q. C. LAMAR,
*Secretary, Washington, D. C.*

SIR: I beg to acknowledge the receipt of your circular letter of May 23, 1887, requiring this Company to show cause on or before the 28th. day of June 1887, why the orders issued by the Department of the Interior withdrawing from settlement, lands within the ind emnity limits lost in grants made by Congress, should not be revoked and such lands restored to settlement.

On June 11, 1882, the Board of Directors of the Mobile and Girard Railroad Co. passed the following:

Whereas: It is the opinion of the Board that the interes ts of this Company will be advanced by a settlement of the question of title to the lands donated to the State of Alabama in trust for this Company under the act of Congress passed in the year 1856 therefore be it

*Resolved:* That the Congress of the United States be petitioned to pass an act confirming the title to such lands as have been sold or disposed of by this Company and that the remainder of the lands revert to the United States, upon condition that this Company be released from the obligations resting upon it as a land grant railroad.

Three members of the Board were appointed and were "empowered to take such measures" as would "secure the desired end."

A memorial was prepared setting forth the manner in which the lands came into possession of the Company—the manner in which certain portions were disposed of the number of acres sold and the prices realised from sales. The fact that the Company was required to pay taxes to the State of Alabama, had done so and was continuing to do so, and that having received notice through P. J. Glover, special agent of the General Land Office, this Company has desisted from all interference with the lands and would desist until the pleasure of Congress is known.

The memorial closed with the offer to relinquish and quit claim all the Company's right and title to the lands and any further aid in the construction of their road under the provisions of the act of 1856 upon the simple condition of relief from the burdens of a land grant railroad.

This memorial was presented and one or more acts introduced to forfeit these lands. The bills were approved in Committee and only failed, as we learned, in passing for want of time.

On two occasions at least, directors of this Company appeared before the Committees urging their favorable report of the bill declaring their forfeiture.

The present condition of the grant is unfortunate. The lands are still being taxed by the State of Alabama and this Company's failure to pay these taxes during the past few years, has rendered them liable for sale for tax, and bought by parties under this shadow of a title have been very seriously depredated upon.

In view therefore, of these facts, this Company has earnestly desired the final adjustment of this question and have no cause to show why the several orders should not be revoked, or such other action taken as shall speedily restore the lands referred to by you to the public domain for settlement.

Respectfully,

J. M. FRAZER,
*Sec'y.*

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## NEW ORLEANS PACIFIC RY. CO.

### ASSIGNEE OF

### NEW ORLEANS, BATON ROUGE & VICKSBURG R. R. CO.

Answer of the New Orleans Pacific Railway Company to the rule taken to show cause why the lands within the indemnity limits of their grant should not be returned to the public domain.

Section 22 of the act of March 3rd, 1871 (The Texas Pacific act), 16th Stat., p. 579, granted to the New Orleans, Baton Rouge and Vicksburg R. R. Co. lands in the same quantities and upon the same terms as were granted to the Texas Pacific within the State of California, by the 9th Section of said act.

This grant was assigned by the grantee to the New Orleans Pacific Railway Company January 5th, 1881 and the road was constructed; and Congress by the act of February 8th, 1887 ratified the transfer and confirmed the grant along all that part of the line of said road not constructed on the 5th of January, 1881.

The 9th Section of the act of 1871 then fixes the quantity and terms of the grant and the act of February 8th, 1887 fixes the line of railroad to which said grant shall apply.

The 9th Section of the act of 1871 fixes the amount of the grant at ten sections per mile on each side of the road or twenty sections in all per mile of the alternate sections designated by the odd numbers. The same section fixed the indemnity limits, the lands within which were devoted to satisfying the absolute grant *provided* that the grant could not be satisfied within the twenty mile limit.

Section 12 fixed the terms upon which said lands should be patented to the grantee which in short were that whenever a stretch of twenty miles of said road was completed, it should be examined by the government and if accepted, the patents for the lands co-terminous with said completed stretch should issue.

Such are the statutory provisions governing the grant. As to the New Orleans Pacific Railway Company, these acts must be construed as if, *it* was mentioned in the granting act, inasmuch as it has been, both by Congress and by the Departments recognized as the successor and assignee of the New Orleans, Baton Rouge and Vicksburg Company.

Now what are the *facts?*

January 5th, 1881, the New Orleans Pacific Railway Company became the assignee of the original grantee and began at once the work of construction which it pushed forward with such energy that by November, 1882, the whole line of three hundred and twenty-eight miles, was in operation. The road was accepted as built in conformity with the intention of Congress.

The Company then made application for the issue of patents to the lands within the granted limits, but this was refused upon one pretext and excuse after another, from time to time until finally the whole matter was brought before Congress by the introduction of bills for forfeiture of the grant.

Congress by direct vote, having refused to forfeit the grant, the Secretary of the Interior ordered the patents to issue and March 3, 1865, patents for 679,287.64 acres were issued.

The Secretary of the Interior on March 11, 1885, ordered the issue of patents to cease until further examination could be made.

After argument he decided to refer the whole matter to Congress recommending the confirmation of the grant to the New Orleans Pacific and such legislation as would confirm and ratify the assignment by the original grantee to the New Orleans Pacific. This recommendation was transmitted to Congress December, 1885, and matters remained in *statu quo* until the 8th day of February, 1887, when Congress by act approved that day did so conform and ratify and fixed the line of definite location for the first time.

In April, 1887, the Company having filed a partial list of its selections, again applied for its patents. That application is pending now, and (as counsel is informed) it will require yet some time to issue them, because of adverse claims and the examination of certain old records not known to the Office until recently.

For answer therefore to the rule issued by the Honorable Secretary of the Interior to show cause on or before June 27th, 1887, why the order of withdrawal of March 27, 1873, and October 15th, 1883 of the lands within the indemnity limits of said New Orleans Pacific Railway Company should not be revoked and the said lands returned to settlement, the said Company respectfully set forth and represents.

First. That hitherto respondents have received patents for only 679,284 acres of land whereas their grant was twenty sections or 12,800 acres per mile for road constructed and accepted for two hundred and sixty miles or 3,328,000 acres more or less.

Second. That they have been and are yet unable to tell how many acres of land they can procure within the granted limits, but that even if they could procure all that had not been "sold, reserved or otherwise disposed of by the United States" at the time of the grant, it will require every acre of vacant public land within the indemnity limits to make up the deficit, and even then the company will fail to receive the quantity of lands intended to be granted by Congress by more than one million eight hundred thousand acres.

Third. That the delay in selecting their lands has not been the fault of respondents. That their road was completed in 1882 and accepted in the same year; that they filed such selections as they could make and asked their patents, but that attempts were made to forfeit their grant in Congress, and protests filed by certain persons in and out of Congress against their rights to patents were so far heeded by the Interior Department as to deny respondents their rights, and that it was not until the act of February 8th, 1887, that the Government determined the date and line of their permanent location, and that selections for some 400,000 acres of land are now pending and have not been acted upon; that thus for five years respondents have been baffled, harassed, and delayed, and that it has not been possible for them, in view of the uncertainty of the final action of Congress, to know, until within the past four months, whether they would receive any portion of the grant they had earned, and that therefore they have not had time to complete fully their selections within the indemnity limits.

Fourth. That respondents are informed that an old book or record of certain entries made under what is known as the "back pre-emption law" of 1818 in the State of Louisiana, and within their granted and indemnity limits (which book or record was until lately unknown even to the Department) has been found, which affects many of the lands hitherto supposed to be vacant, and that respondent has been unofficially informed, that until said books and records are fully examined and posted, that it will be impossible for even the Department, far less respondent, to know what lands are vacant, and subject either to the grant or as indemnity.

Fifth. That respondents have been diligent and active in the prosecution of their rights and are now carefully revising their selections,

and that until they shall have done so, it would be manifestly unjust and illegal to deprive them of the privilege of selecting such lands as they may be able to find within the indemnity limits, especially in view of the many and long continued vexatious delays and embarrassments to which they have been subject by the Legislative and Executive branches of the government and in view of the further fact that if they should acquire every acre of land within their indemnity limits they will still fail to receive within 1,800,000 acres of the quantity of lands to which in law and within the intendment of Congress they are entitled.

Hence respondents pray that the rule taken herein, as to them may be discharged, and for general and equitable relief.

ELLIS, JOHNS & McKNIGHT.
*Attorneys for Respondents.*

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NORTHERN PACIFIC R. R. CO.

HON. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR: In the matter of the rule of your Department issued on 23d May, 1887, addressed (among others) to the Northern Pacific Railroad Company, to show cause on or before the 27th inst. why the several orders of withdrawals from settlement of the lands within the indemnity limits of said road as therein indicated should not be revoked, and the lands therein embraced restored to settlement, the said company respectfully makes answers as follows:

Said rule sets forth that in respect to the several withdrawals therein specified within the States and Territories therein named, the company has either made selection of all the lands to which it is entitled, or has selected all liable to such selection in lieu of those lost in place.

The withdrawals referred to are located in the States of Minnesota and Wisconsin, and the Territories of Dakota, Idaho and Washington, although those in Idaho and Washington are placed under the caption of "Dakota Territory."

We would also respectfully say here that the withdrawals in Dakota Territory, "March 30, 1872," the date given in your order, embraced *no indemnity* lands, said order being of lands along the line of general route. The withdrawals of indemnity lands in that Territory were made in 1873 to the Missouri river, and in 1880 west of that point.

By the act of July 2d, 1864, Congress incorporated the Northern Pacific Railroad Company, and authorized and empowered it to lay out, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, "beginning at a point on Lake Superior, in the State of Minnesota, or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by the company, within the territory of the United States on a line north of the forty-fifth degree of latitude to some

point on Puget Sound, with a branch *via* the valley of the Columbia river to a point at or near Portland, in the State of Oregon."

By the joint resolution of May 31, 1870, Congress authorized the company to construct its main line *via* the valley of the Columbia river to Puget Sound, and its branch *via* the Cascade Mountains to the same waters.

This road necessarily ran through several political divisions of the Union, to wit: the States of Wisconsin, Minnesota and Oregon, and the Territories of Dakota, Montana, Idaho and Washington, but, further than to obtain the consent of the legislatures of the States through which said railroad line should pass, to construct its line therein, it was in no wise controlled by such political divisions in its rights, privileges, grants and franchises acquired by the charter.

To aid in the construction of said road Congress granted to *said Company* from the public lands *along the entire line*, without reference to State or territorial limits, and uncontrolled thereby, every alternate section of land designated by odd numbers for twenty alternate sections per mile on each side of the road whenever it passed through a territory, and ten alternate sections on each side whenever it passed through any State, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

The charter then goes on to provide that "whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

It will thus be seen that the area of the twenty alternate sections per mile in the Territories and ten in the States along the *entire line of the road* becomes the measure of the quantity of lands granted, and in like manner the area of such of said selections as may have been sold, reserved or otherwise disposed of, etc., along the entire line becomes the measure of the indemnity, which is to be selected, not in any particular State or Territory, but "in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections," meaning the sections in place.

There is, then, only one limit to the locus of the indemnity lands, and that is ten miles on each side of and beyond the granted sections. This limit, like the grant, extends along *the entire line of the road* from terminus to terminus, and it can make no difference whether the loss is in Minnesota or Washington Territory, or whether it is greater or less in one than in the other, for the grant is common to the whole road, not to the road in Minnesota or to the road in Washington Territory, and the

losses are likewise common to the whole road, they are losses to the *company*, and so the indemnity lands are equally common to the whole road and given to supply those losses.

As declared by your predecessor, Secretary Teller, in his decision of May 17, 1883, (2 L. D., 512–516,) "it was clearly the intention of the Legislature that, within the indemnity limits fixed by the Northern Pacific Acts, the company should have the opportunity to take lands *acre for acre for all those* lost in place."

By the joint resolution of May 31, 1870, Congress becoming convinced that the indemnity limit fixed in the original charter would not indemnify the company for losses in the "place" sections, provided an *additional* indemnity limit, but this was only to make up losses occurring *after* the passage of the act, which could not be satisfied in the limit first provided, and was restricted to the particular State or Territory in which it occurred. The provision has no bearing upon the indemnity provided in the original charter, and in no manner restricts *that* indemnity to any State or Territory or the losses therein.

If the company lost 6,000,000 acres within the grant betweens its termini, it is entitled to select 6,000,000 acres within the indemnity belt between said termini. That is the plain intendment of the law; it is what the statute confers, and what it means to be enjoyed. To give it any other meaning is to pervert and defeat its purposes.

In this view of the law we respectfully submit that neither in the Territories of Dakota, Washington or Idaho has the company made selection of all the lands to which it is entitled, nor has it selected all open to such selection in lieu of those lost in place *within the limits of its grant.*

From an estimate made by the Commissioner of the General Land Office there would appear to be a gross deficiency in the sections in place along the entire line of about 7,110,283 acres, and from an estimate made by the company the area of the odd numbered sections within the first indemnity belt along said line, subject to be selected by it, is about 6,593,865 acres, thus showing that if the company shall obtain all the lands withdrawn for indemnity purposes in this belt it would fall short on its total grant 516,418 acres. Within the limits of the land districts in Wisconsin and Minnesota the company has selected all the lands it has to the present time found vacant and subject to selection for indemnity purposes; therefore, as to those districts, the company knows of no lands heretofore therein withdrawn for indemnity for its road now subject to be restored to settlement.

It is true that in the land districts in Dakota the company has selected more land than there are losses in those districts, but this is because along the line east of that point there was not sufficient land left in the indemnity belt to make up the losses of the sections "in place," and because the law confers the right to "take land acre for acre for all those lost in place." (Sec'y Teller—*Supra.*)

As to the withdrawals along other portions of the line, through Dakota, Idaho and Washington Territories, named in your order, the questions involved seems more properly to come within the purview of your second rule made returnable on the 28*th inst.*, and the company therefore begs leave to ask your attention to its answer to that rule made in another communication.

W. K. MENDENHALL,
*Attorney of the N. P. R. Rd. Co.*

GEORGE GRAY,
*Counsel.*

WASHINGTON, D. C., *June* 25, 1887.

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NORTHERN PACIFIC RAILROAD COMPANY.

The reason of this rule as therein set forth, is that said company has not informed the Department to what extent it is entitled to lands within such indemnity limits by reason of those lost in place, and that ample time has been given it to assert its rights in this behalf; hence that no sufficient reason exists for longer continuing in force said several orders of withdrawal, or that a time certain should be fixed within which its rights should be asserted, and that lands to which said company are not entitled in said indemnity limits should be restored to settlement.

To this the Northern Pacific Railroad Company respectfully submits the following answer:

Said company was chartered by Congress by act approved July 2d, 1864; no bonds or money subsidy of any kind was given to aid it in the work it was to do in the construction of a line of road over 2,000 miles in length from Lake Superior to Puget Sound through an unknown country, at that time almost wholly under control of the Indians, and believed to be for the most part of little if any value for agricultural purposes.

To aid the company, however, Congress did make a donation of this land to the extent of ten alternate sections per mile on each side of the road when it ran through a State, and twenty like sections when it ran through a Territory.

To insure this quantity of land to the company, Congress provided that if, when the line of road was definitely located and maps thereof duly filed, it should be found that the Government had sold, reserved, granted, or in any other manner disposed of any of the sections granted, the company should have the right to select from the odd numbered sections not further than ten miles from those granted, other lands in lieu of those so disposed of and to the extent of such disposal.

The general want of knowledge of the country to be traversed, and its then supposed valuelessness, rendered uncertain the success of so large a venture, consequently capital was slow to embark in the under-

taking, and it was not until 1870, or six years after the grant, that the company was in position to start on its work. During 1870 and 1871, however, the company succeeded in constructing the road through Minnesota, except a few miles on the eastern end, and in November of that year filed its map of definitely located and constructed road, upon which the first withdrawal of *indemnity* lands was made, in December of that year.

In 1873 it accomplished the location of its line from the west boundary of Minnesota to the Missouri River in Dakota, and a withdrawal of indemnity lands was made in that year upon this part of the line.

In the fall of 1873 occurred the financial panic known to all, and which destroyed all hope of a continuance for a long time of the work of construction, and, excepting a few miles built in Washington Territory in 1874, south from Tacoma, it was not until 1880 that the company again became financially able to resume work.

Since 1880 the company has prosecuted with (it does not hesitate to say) unusual vigor the work of locating and constructing its line of road, so that to-day it has over 2,100 miles of continuous line of rail from Ashland, on Lake Superior, to Tacoma, on Puget Sound.

Its map of definite location, from the Missouri River westward, and from Puget Sound eastward, were promptly filed as completed during the years 1880 to 1885, and withdrawals of indemnity lands were made thereon except upon the following maps:

1st. From Kalama to Portland; filed September 22, 1882.

2nd. From Spokane Falls, in Washington Territory, to Sandy Point, in Idaho; filed August 30, 1881.

3rd. From Sandy Point, in Idaho, to the mouth of Missoula River in Montana; filed December 12, 1882.

4th. From Townships 17 N., Range 18 E., to Township 21 N., Range 8 E., in Washington Territory; filed December 8, 1884.

Upon these maps no adjustment of either the granted or the indemnity limits has been made by the General Land Office, although the company has frequently requested it to be done, and although your predecessor (Secretary Teller), in his decision of May 17, 1883, (2 L. D., 512,) so directed.

For want of these adjustments the company has been not only unable to ascertain its losses, but to select indemnity along these parts of its road.

We also desire to say here that no withdrawal of indemnity lands has been made in Idaho on the definite location extending through said territory, and that the date of withdrawal, May 17, 1872, given in your order, refers to the withdrawal or general route, which embraced no indemnity lands.

With the exception therefore, of the withdrawal on the maps of 1871 and 1873, in Minnesota and part of Dakota, and in 1873 and 1874 in Washington Territory, between Kalama and Tacoma, lands in the in-

demnity limits of the company's grant, where withdrawn, have been so withdrawn for a period not exceeding seven years, and for the most part not to exceed five years. And along the line in Minnesota and Dakota above indicated it is only within the last few years that the surveys of the indemnity lands were completed so that full selection of them could be made.

Of the lands within the indemnity belt thus withdrawn not less than 3,514,000 acres remain *unsurveyed*, and, therefore, are not yet brought within reach of formal selection by the company.

It is also a fact that over 20,000,000 acres of the granted section nearly, if not quite, one-half of the entire grant, remain unsurveyed, embracing military and Indian reservations lost to the company, and for which indemnity must be sought, but which cannot be taken until the surveys are made and the quantity of loss thus ascertained.

There is also a large number of claims of settlers and others to lands within the granted limits pending before the Land Department, as well as other questions affecting the extent of the grant, and until these are decided the company cannot know whether such lands will inure to it or whether it will be required to seek indemnity for them.

Within the indemnity withdrawals of 1871, '73 & '74, in Minnesota, Dakota and Washington Territory, the company has selected all the lands it has found vacant and subject to appropriation for that purpose, as also within the withdrawal of 1883, in Wisconsin.

It has also selected, so far as surveyed, all the lands within the indemnity withdrawals along other portions of its road made between 1880 and 1885, except about 100,000 acres which its officers are now engaged in selecting.

Therefore, with the exception of this amount, the company has reached the point where further action on its part is suspended until the Commissioner of the General Land Office, shall furnish the district offices with maps showing the granted and indemnity limits on the definitely located lines heretofore referred to as not adjusted, and until the Government shall make further survey of the lands in the indemnity belt.

Until these things are done the company can do no more.

It is therefore respectfully submitted that for selections yet necessary to be made to make up the total deficiencies in the grant, the company *has not had ample* time to act; in fact, it has had no time whatever, and it is to-day waiting action by the Government in the direction of surveying the remainder of the granted and indemnity lands, and of the Commissioner of the General Land Office in the matter indicated, and we may add, the determination of your Department upon the several questions before you affecting its grant.

When these matters are adjusted so that the quantity of loss is ascertained, and the lands are surveyed so that the company can select, it will promptly list its lands.

| | Acres. |
|---|---|
| Upon the estimated showing of the Commissioner of the General Land Office the gross deficiency of the land is about | 7,110,283 |
| while the area of the first indemnity belt is estimated by the company at | 6,593,865 |
| leaving a deficit of | 516,418 |
| The company has selected in the first indemnity belt | 2,979,188 |
| which, deducted from its area | 6,593,865 |
| leaves for selection only | 3,614,677 |

while the amount further required to make up deficiences is 4,131,095 acres, as follows:

| | |
|---|---|
| Gross deficiency | 7,110,283 |
| Selected | 2,979,188 |
| | 4,113,095 |

Thus leaving, as above stated, 516,418 acres which cannot be acquired in that belt.

The company, however, has selected in the second indemnity belt in Minnesota, as provided in the joint resolution of May 31, 1870, 372,011 acres, still leaving a deficit of 144,407 acres, which must be made up from the second belt, if at all.

This amount will be largely increased, rather than diminished, as the adjustment of conflicting claims goes on.

The company therefore insists:

1st. That it has thus far promptly asserted its rights to the lands within its indemnity limits to the extent that the action of the Government and the Land Department will permit.

2d. That it can go no farther until the government surveys the remaining granted and indemnity lands, and no faster than those surveys progress.

3d. That until the completion of the surveys of the sections in the granted limits, and the adjudication of the rights of the company thereto, neither the company or your Department can definitely determine to what extent it is entitled to lands within the indemnity limits.

4th. That these are sufficient reasons for continuing in force the several orders of withdrawal affecting its lands; to which, however, may be added the right guaranteed to the company by Congress in its charter, that it should have indemnity for all lands disposed of prior to the location of the road, and that to fulfill this pledge will more than absorb all the lands available for the purpose within the first indemnity limit; so that when the promise of the government is made good there will be no lands to restore to settlement.

5th. That the revocation or rescinding of the orders of withdrawal will not simply put others on an equal footing with the company, but will give them manifestly unjust advantage, for the *unsurveyed* lands would *at once* be open to settlement and appropriation, while the company would have to wait the survey of the lands before it could make

selection, at which time it would find large quantities already appropriated.

This would be a plain breach of the assurance of Congress that the company should have the full measure of its grant to the extent of the limits prescribed in its charter.

Wherefore the company respectfully suggests that it is premature to call on it at this time to show cause why the several orders of withdrawal of indemnity lands should not be revoked, and that it should be afforded the opportunity, after survey of the land, to make the remainder of its selections before it shall be adjudged to be in default.

Therefore, in view of the present condition of the grant, with which it is not chargeable, it prays that no revocation affecting its indemnity lands be made at present, nor until it is given the opportunity as the surveys progress to make its selections.

W. K. MENDENHALL,
*Attorney for the Northern Pacific R. R. Co.*

GEORGE GRAY,
*Counsel.*

WASHINGTON, D. C., *June* 25, 1887.

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## OREGON & CALIFORNIA R. R. CO.

OFFICE OF THE OREGON AND CALIFORNIA RAILROAD COMPANY,
*Portland, Oregon, June* 14, 1887.

To the Hon. SECRETARY OF THE INTERIOR OF THE UNITED STATES:

The Oregon and California Railroad Company, responding to the rule entered in your office on May 23, 1887, requiring railroad companies to show cause why existing orders withdrawing public lands within the indemnity limits of the land grants to such railroads should not now be revoked, and such lands restored to settlement, respectfully showeth as follows:

First. That by act of Congress of July 25, 1866, (14 Stat. p 239), there was granted to this respondent to assist it in constructing its railroad and telegraph line therein mentioned, every alternate section of public lands, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, (ten on each side), of said railroad line, and that the indemnity limit prescribed in said act is ten miles in width beyond the limits of said lands in place, contained within said twenty miles limit; and that it appears from the lists of lands lost in place by this Company, which lists are on file in the proper office of the Department of the Interior, that more land has been so lost by this respondent than is or will be contained in all the odd numbered sections within the entire indemnity limits pertaining to that portion of said railroad to which said lists of lost lands pertain.

Second. A very large proportion of the lands within said ten mile indemnity limits, for the entire length of respondent's railroad, as constructed from Portland to the present terminus of said road near Ashland in the State of Oregon, is unsurveyed land, which when surveyed will contain as estimated by respondent, about 843,180 acres, from which it has been, now is, and until said lands shall be surveyed, it will be impossible for respondent to make any selections in lieu of lands so lost in place.

Third. That as to the last one hundred miles of respondent's said railroad, as constructed from the forty-fifth mile post South of Roseburg, Oregon, said portion of said railroad was accepted by the President of the United States on January 19, 1887, since which sufficient time has not elapsed to afford respondent the opportunity of preparing its selection list of lieu lands within the indemnity limits pertaining to said one hundred miles of road, in compensation for the lands lost in place along said one hundred miles of road. The lists of said lands lost in place, on file in the proper office of the Department of the Interior, are as follows:

List No. 1.—Oregon City Land Office, filed prior to September 1, 1886, shows lost lands,—6,328 46-100 acres.

List No. 2.—Oregon City Land Office, filed September 1, 1886, shows lost lands,—926,750 85-100 acres.

List No. 1.—Roseburg Land Office, filed February 15, 1886, shows lost lands,—5,099 33-100 acres.

List No. 2.—Roseburg Land Office, filed February 15, 1886, shows lost lands,—456,307 51-100 acres.

List No. 3.—Roseburg Land Office, filed May 23, 1887, shows lost lands,—293,006 70-100 acres.

Making the total of lands lost in place 1,687,492 85-100 acres, while according to examination made by respondent of the plats in said land offices, it appears that there are of vacant lands in said entire indemnity limits only the quantity of 1,405,426 acres in all, out of which to compensate said lost lands, leaving the quantity of 282,065 85-100 acres to be wholly lost by your respondent, for want of any lands from which to seek compensation; and as is hereinbefore stated, about 843,180 acres of said 1,405,426 acres within said indemnity limits is still unsurveyed land, from which it is not possible for respondent to make selections.

Fourth. Respondent is now constructing the portion of its railroad from said 145 mile post south of Roseburg to the southern boundary line of the State of Oregon, and expects to have it completed within a few months from the present time. Should this portion of its road when completed be accepted by the President, there would be within the indemnity limits pertaining thereto 94,741 acres more than the acres lost in place on that portion of the road which, if added to the land above named, would reduce the quantity of land which the Company would lose on its entire land grant, and for which it cannot obtain indemnity,

to 187,325 85-100 acres; that is, estimating the entire acreage of odd numbered sections of vacant lands and of unsurveyed lands, within the indemnity limits along the whole length of the road from Portland to the State line as being subject to selection, whereas in fact much of said land in the Lakeview District, which respondent has included in the acreage subject to selection, and some of the unsurveyed land along the entire line of the road, has been settled upon and thereby excluded from selection by respondent.

Fifth. On the 19, day of January, 1885, a receiver of respondent's property was appointed by the circuit court of the United States for the District of Oregon, who, in obedience to the order of court by which he was appointed, took charge of all the property of respondent, and still holds possession thereof by said order of court, and this Company was enjoined from further controlling or interfering with the same. That because of the manifested disposition and supposed intention of the last Congress to declare forfeiture of railroad land grants, and of the uncertainty as to whether under the existing circumstances the President would accept of said last and recently completed one hundred miles of respondent's railroad, said receiver deemed it injudicious to incur the expense of preparing selection lists of indemnity lands, until he should be further advised of the necessity and expediency of so doing, and without the sanction and approval of said receiver and court, your respondent had neither right, authority or ability to cause such selections to be made and said lists to be prepared.

And your respondent now most respectfully submits and insists that, because of said facts, that is to say, inasmuch as the whole number of odd sections contained, or which will when surveyed be contained, within the entire indemnity limits of said land grant, would fall short of compensating respondent for its lands lost in place as aforesaid, and as the larger portion of said lands have never been surveyed so as to render it possible for respondent to make selections of such lieu lands, and because of the very recent acceptance by the President of said last completed one hundred miles of said railroad, since which sufficient time and opportunity has not been afforded respondent, in any event, to have made selection and prepare lists of its indemnity lands pertaining to that portion of said land grant, and because of the appointment and controlling authority of said receiver in the premises as aforesaid, it would work a great hardship and manifest injustice if said existing order withdrawing said lands within said indemnity limits from settlement, should now be revoked and said lands be opened up for settlement, without affording respondent a reasonable opportunity for selecting therefrom its said lieu lands.

Wherefore respondent respectfully prays that said rule be not enforced as against respondent, but that the same may be held in abeyance as to surveyed lands, for such further and reasonable time as may seem just, to allow of its selection of its lieu lands therefrom by respond-

ent; and as to said unsurveyed lands, until the same shall be surveyed, and a reasonable time thereafter shall have been given respondent to select and prepare and file its lists of lieu lands which may be then found.

All of which is most respectfully shown, submitted and requested.

THE OREGON AND CALIFORNIA RAILROAD COMPANY,
By GEO. H. ANDREWS,
*Acting Land Agent.*

STATE OF OREGON,
*County of Multnomah, ss:*

I, George H. Andrews, being duly sworn, say on oath that I am Acting Land Agent of the Oregon and California Railroad Company, and that the statements contained in the foregoing response are true as I verily believe.

GEO. H. ANDREWS.

Subscribed and sworn to before me this 14, day of June, A. D. 1887.
[SEAL.] F. G. EWALD,
*Notary Public.*

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PENSACOLA & ATLANTIC R. R. CO.

Hon. SECRETARY OF INTERIOR,
*Washington, D. C.*

PENSACOLA, FLA., *June 23rd*, 1887.

SIR: I beg to submit list of *unselected* lands withdrawn west of Chattahoochee to build a rail-road from St. John's River at Jacksonville to the waters of Escambia Bay at or near Pensacola, Fla., under act approved May 17th, 1856.

These lands aggregate 291,871.36 acres and cannot be selected and should be returned to the public domain as contemplated in your cirlar of May 23d, 1887.

Respectfully,

W. D. CHIPLEY,
*Vice-President.*

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ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RY. CO

Hon. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR: Now comes the St. Louis, Iron Mountain and Southern Railway Company, by its counsel, and answering the rule entered by you upon said Company on May 23rd 1887, and returnable on June 28th 1887, to show cause why its existing indemnity withdrawal "should not be re-

voked, and the lands therein embraced restored to settlement," respectfully shows:

First:—That said Company is the successor by consolidation of the Cairo & Fulton R. R. Co., of Arkansas; and the St. Louis & Iron Mountain, and the Cairo, Arkansas & Texas R. R. Companies of Missouri.

Second:—That by Act approved February 9th 1853, (10 Stats. p. 155) Congress granted to the States of Arkansas and Missouri lands to aid in construction of a railroad from the Mississippi river opposite the mouth of the Ohio in Missouri to the Texas boundary line near Fulton in Arkansas, with branches from Little Rock, Arkansas, to the Mississippi River and Fort Smith.

Such grant was of even numbered sections for six sections in width on each side of the road, with right to select within a larger limit of fifteen miles other lands in lieu of such within the grant in place as were found on definite location to have been—

"sold, or to which the right of pre-emption has attached as aforesaid, which lands, *being equal in quantity to one half of six sections in width on each side of said road*, the States of Arkansas and Missouri shall have and hold to and for the use and purpose aforesaid."

Third:—This grant was conferred by said States upon the Companies now forming the consolidated St. Louis, Iron Mountain & Southern Railway Company.

Fourth: The time named for the construction of the road therein having expired, Congress by Act of July 28th, 1866 (14 Stats., p. 328), revived and extended the original grant, by granting five additional odd numbered sections per mile.

Fifth:—The entire road was only located, and thereafter seasonably constructed within the period required by the later grant.

Sixth:—Conveyance of all lands thereunder has been made except—

(*a*) Pending list of about 3,000 acres of indemnity selections in Arkansas, and

(*b*) Pending list of about 6,575 acres of indemnity selections in Missouri.

These are on file in the General Land Office.

Seventh:—The grant is largely deficient and the quantity granted by Congress can never be secured.

Wherefore: this Company has no present objection to the revocation of the indemnity withdrawals, *provided* such revocation shall in clear terms except therefrom all *selected* lands pending final adjustment of the grant. This adjustment the Company is anxious to obtain and has heretofore been unable to procure. Until had, its pending selections create a vested right in the land selected (112 U. S., p. 720) and no adverse rights can be lawfully initiated therein.

Very respectfully,

BRITTON & GRAY,
*Attorneys for St. L., I. M. & So. R'y Co.*

ST. PAUL & DULUTH R. R. CO.

WASHINGTON D. C. *June* 27, 1887.

To The Honorable SECRETARY OF THE INTERIOR,

The Lake Superior and Mississippi Railroad (now Saint Paul and Duluth) Company in response to the order to show cause (dated May 23, 1887) why the several orders of withdrawal from settlement of the lands within the indemnity limits of the said railroad should not be revoked and the lands restored to entry respectfully submit the following objections to said proposed action:

First: The act of May 5, 1864, making a grant to the State of Minnesota for the purpose of aiding in the construction of a railroad in said State from the city of Saint Paul to the head of Lake Superior, is a grant of absolute quantity "to the amount of five alternate sections per mile on each side of the said railroad."

Second: The quantity of land granted by the said act has not been certified to the State of Minnesota for the benefit of said road, more than 100,000 acres being yet due to satisfy the grant.

Third: If there be any vacant lands within the indemnity limits of the said road which have not been selected by or in behalf of the company now owning the said grant, the third section of the act of July 13, 1866, (14 Stat. 97) requires the Secretary of the Interior to certify the said lands to the State of Minnesota for the benefit of the road, to the extent of satisfying the grant, and when this has been done the Saint Paul and Duluth Railroad Company will not and cannot object to the restoration of any vacant and unappropriated then remaining within the limits of the grant.

Fourth: The Saint Paul and Duluth Railroad Company, successor to the Lake Superior and Mississippi Railroad Company, has no knowledge of the location or existence of any vacant and unselected land lying within the limits of the grant by acts of May 5, 1864, and July 13, 1866, but if there be any such land the Company respectfully object to its being declared open to settlement, until the grant to the State of Minnesota made by the said acts shall have been satisfied.

Very respectfully,

FRED. BRACKETT,
*Attorney St. Paul & Duluth R. R. Co.*

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ST. PAUL, MINNEAPOLIS & MANITOBA RY. CO.

To the Honorable SECRETARY OF THE INTERIOR:—

The St. Paul, Minneapolis & Manitoba Railway Company, in response to the order to show cause, hereto annexed, respectfully suggests the facts and considerations hereinafter set forth, as sufficient reasons why the orders of withdrawal heretofore made for its benefit of lands within the Indemnity limits of its Land Grant, should not be revoked, and as

reasons why such orders should be continued in force until the final and complete adjustment of its grant shall have been accomplished.

The several acts of Congress making, and relating to said Company's grants, are as follows:

I. "An act making a grant of land to the Territory of Minnesota, in in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in said State." (Approved March 3, 1857. 11th U. S. Stats. at Large, pp. 195, 196.)

By the said Act, there were granted to the Territory of Minnesota, for the purpose of aiding in the construction, among other railroads, of a main line of railroad extending from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone lake and the mouth of the Sioux Wood river, with a branch thereof commencing at St. Anthony, and extending via St. Cloud and Crow Wing, to such point on the navigable waters of the Red River of the North as the Legislature of the Territory might determine, every alternate section of land designated by odd numbers, for six (6) sections in width on each side of the said road and branch, with an indemnity clause in the following terms:

But in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the Governor of said Territory or future state, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands, (thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the Territory or future State of Minnesota, for the use and purpose aforesaid; *Provided*, that the land to be so located shall, in no case, be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches.

In pursuance of the power conferred by this Act, the Legislature of the Territory of Minnesota established the north-western terminus of the said branch line, at the town of St. Vincent, on the boundary between the United States and British America.

Within one year after the passage of the said Act, the Territory of Minnesota had, through the agency of the Minnesota & Pacific Railroad Company, the first predecessor of the St. Paul, Minneapolis & Manitoba Railway Company in the ownership of the said lines of road, definitely located upon the ground the whole of the said main line of railroad lying westward of St. Paul, and all that part of the said branch

line extending from a point of junction with the main line at or near St. Anthony, (now Minneapolis East) and Crow Wing, and had caused maps of such definite locations to be duly filed in this Department.

Since, however, the public surveys had not, at that time, extended westward of the Range of Townships numbered Thirty-eight (38) west from the Fifth Principal Meridian, this Department, acting under a rule then in force, is understood to have declined to accept so much of the said map as showed that part of the said main line, extending westward from the said tier of townships, as a final map of the definite location of that part of the said line.

II. "A joint resolution authorizing the State of Minnesota to change the line of certain branch railroads in said State, and for other purposes." (Approved July 12, 1862, 12th U. S. Stats. at Large, pp. 624, 625.)

The body of said resolution was as follows:—

That in lieu of that part of the railroad grant to Minnesota Territory by act of Congress, approved third March, eighteen hundred and fifty-seven, which extends northwesterly from the intersection of the tenth standard parallel with the fourth guide meridian, there shall be granted to the State of Minnesota the alternate sections within six mile limits of such new branch line of route as the authorities of the State may designate, having its southwestern terminus at any point on the existing line between the Falls of Saint Anthony and Crow Wing, and extending in a northeasterly direction to the waters of Lake Superior, with a right of indemnity between the fifteen mile limits thereof, provided this resolution shall take effect from the filing in the General Land Office of the acceptance by the authorities aforesaid of such substitution, whereupon the land north of the intersection aforesaid, in the grant as authorized by the said act of third March, eighteen hundred and fifty-seven, being by said acceptance disencumbered, of the railroad grant, shall be dealt with as other public lands of the United States.

This joint resolution was, shortly after its passage, duly accepted by the State of Minnesota, so that the same became operative, according to the terms thereof. But, it is to be noted, that no line of railroad had ever been located by the Territory of Minnesota, or its grantees, to or via the point of intersection named in the said resolution.

III. "An Act extending the time for the completion of certain railroads in the States of Minnesota and Iowa, and for other purposes." (Approved March 3, 1865. 13th U. S. Stats. at Large, p. 526.)

The granting clause of this act is, as follows:

That the quantity of lands granted to the State of Minnesota, to aid in the construction of certain railroads in said State, as indicated in the first section of an (act) entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands, in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State," approved March third, eighteen hundred and fifty-seven, shall be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts, and as hereinafter provided.

The indemnity clause in the Act of 1857 was also thereby amended, as follows:

That the first proviso in the first section of the act aforesaid shall be so amended as to read as follows, to wit: *provided*, that the land to be so located shall in no case be further than twenty miles from the lines of said roads and branches, to aid in the construction of each of which said grant is made; and said lands granted shall, in all cases, be indicated by the Secretary of the Interior.

By the same act it was further provided, that the provisions thereof should be construed, so as to apply and extend to that portion of the line authorized to be vacated by the said joint resolution, approved July 12, 1862, notwithstanding the vacation thereof by said state, as though said joint resolution had not passed, and also to the line adopted by said State, in lieu of the portion of the line so vacated.

IV. "An act relating to lands granted to the State of Minnesota to aid in constructing railroads." (Approved July 13, 1866. 14th U. S. Stats. at Large, p. 97.)

This act deals principally with the mode of selecting, certifying, and disposing of the lands granted by the previous acts.

V. "An act authorizing the St. Paul and Pacific Railroad Company to change its line in consideration of a relinquishment of lands." (Approved March 3, 1871. 16th U. S. Stats. at Large, p. 588.)

The body of this act is in the following terms:

That the St. Paul and Pacific Railroad Company may so alter its branch lines, that instead of constructing a road from Crow Wing to St. Vincent, and from St. Cloud to the waters of Lake Superior, it may locate and construct in lieu thereof, a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Ottertail or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands, to be taken in the same manner along said altered lines as is provided for the present lines by existing laws; *provided, however*, that this change shall in no manner enlarge said grant, and that this act shall only take effect upon condition of being in accord with the legislation of the State of Minnesota, and upon the further condition that proper releases shall be made to the United States by said Company of all lands along said abandoned lines, from Crow Wing to St. Vincent, and from St. Cloud to Lake Superior, and that upon the execution of said releases, such lands so released shall be considered as immediately restored to market without further legislation.

The last-mentioned act was, shortly after its passage, duly accepted by the State of Minnesota, and by the predecessor of the St. Paul, Minneapolis & Manitoba Railway Company in the ownership of the said line of railroad, so that the same became operative in accordance with the terms thereof.

Subsequently to the passage of the acts aforesaid, there were passed by Congress one or more acts, extending the time for the completion of the said lines of railroad, but it is not deemed, for the purposes of this inquiry, essential to make especial reference thereto.

Under and in pursuance of the said several acts of Congress, and in conformity therewith, the predecessors of the St. Paul, Minneapolis & Manitoba Railway Company in the ownership of the said lines of railroad had prior to January 1, 1872, filed in this Department an additional map of definite location of the said main line, showing the definite location of that portion thereof situate west of the said tier of townships numbered thirty-eight (38), relatively to the government Surveys of lands along the same, which had, prior to that time, been completed; and had actually constructed, completed, and put into operation, the whole of the said main line, between St. Paul and Breckenridge, on the western boundary line of said State; the same having a length of about 216 miles; and had actually completed all that part of the said branch line, extending from St. Anthony to Sauk Rapids, a distance of about 67 & 2-10 miles, and had definitely located, and filed in this Department a map of such definite location of, that re-located portion of the said original branch line extending from St. Cloud to St. Vincent, commonly known as the "St. Vincent Extension;" and prior to January 1, 1874, had actually constructed and completed about 140 miles of the said Extension Line; and prior to January 1, 1880, had actually constructed and completed the remainder thereof; the entire length of the said so-called Extension line, from St. Cloud to St. Vincent, being about 315 miles; and of the whole of said branch line, between St. Anthony and St. Vincent, including that portion thereof extending from St. Cloud to Sauk Rapids, being about 382 & ½ miles; all of which portions of the said completed lines were from time to time, after the completion thereof, duly accepted by the Governor of the said State, and by the Government of the United States, as having been constructed and completed in conformity with the requirements of the said several Acts of Congress.

That portion of the said main line, extending from St. Paul to Minneapolis, being a distance of about 10 miles, and that portion of the said branch line, extending from a junction with the said main line, at St. Anthony, to a point at or near Elk River, a distance of about 29 miles, were constructed and completed prior to the passage of the said Act of March 3, 1865, and, therefore, were entitled only to the quantity of lands mentioned in the said Act of March 3, 1867, to-wit: six (6) alternate sections of land, per mile of road; but, all of the residue of said lines are, and have been, entitled to ten (10) alternate sections of land for each mile thereof.

The total quantity of lands within the place limits of the said main line of road, lying within the State of Minnesota, to which the said Territory and State, as grantee of the United States, and the St. Paul, Minneapolis & Manitoba Railway Company, and its predecessor in the ownership of the said line, would have been entitled as assignee of the said Territory and State, but for pre-emptions, homesteads, private entries, and conflicting grants, which had attached to portions of

said lands, prior to the date of the definite location of the said main line, is, approximately, 1,270,341 & 95-100 acres. Of said quantity, the said State, and the said Railroad Companies, have had conveyed to them, within the place limits, about 896,372 & 53-100 acres, leaving approximately, 373,969 acres to be obtained from the Indemnity limits.

From the latter, there have been selected by, and conveyed to, said State, and by the latter to the Railroad Companies, about 353,148 & 44-100 acres, leaving a deficiency of about 20,820 & 98-100 acres to be obtained from further selections from the Indemnity limits.

Such additional selections have been made, and lists thereof filed, in the Local Land Offices, and duly allowed by the Local Officers, but which remain unadjusted by the Commissioner of the General Land Office, and consequently uncertified to the State of Minnesota, to the total amount of about 241,139 & 65-100 acres.

Of the said indemnity lands, selected or certified, and conveyed as aforesaid, a large quantity, amounting, as nearly as at present can be computed, to about 30,000 acres, lie within the place limits of the grant made to the State of Minnesota by act bearing date July 4, 1866, to aid in the construction of the Hastings & Dakota Railroad; and of the said lands, selected but not yet certified to said State, a large additional quantity, amounting, as nearly as can be computed at the present time, to about 40,000 acres, also lie within said place limits. And the St. Paul, Minneapolis & Manitoba Railway Company is informed and believes, that the present owners of the grant, made in aid of the Hastings & Dakota Railroad, dispute the right of said St. Paul, Minneapolis and Manitoba Railway Company to obtain any indemnity lands, whatever, within the place limits of the said Hastings & Dakota grant.

The St. Paul, Minneapolis & Manitoba Railway Company denies the validity of such claim; and undoubtedly, if such claim be persisted in, it can only be finally decided by litigation; and said adverse claims growing out of said conflicting limits will necessarily render impossible, prior to the final determination thereof, any complete adjustment of the grant for the said main line.

The total quantity of lands in the place limits of the said branch line, including the said re-located part thereof, commonly known as the St. Vincent Extension, to which the said State and the said Railroad Companies would have been entitled, but for pre-emptions, homesteads, private entries, and conflicting grants which had attached to portions thereof, prior to the definite location of the several parts of the said branch line, is about 2,147,273 & 28-100 acres.

Of the said quantity, there have been certified to said State, and by said State conveyed to the said Railroad Companies within the said place limits, about 1,017,777 & 68-100 acres, leaving about 1,129,495 & 60-100 acres to be obtained from the indemnity limits.

From the latter, there have been heretofore selected and certified to said State, and by the State conveyed to said Railroad Companies, about

645,438 & 10-100 acres, leaving a deficiency of 484,057 & 50-100 acres to be obtained from further selections.

Additional selections have already been made, and allowed by the Officers of the Local Land Offices, but which remain pending and unadjusted in the office of the Commissioner of the General Land Office, to the amount of about (784,699 & 53-100) acres.*

But, of the said lands, so certified to the State of Minnesota, and by the latter conveyed to the said Railroad Companies, within the place and indemnity limits, a large quantity, amounting to ab out 116,859 & 22-100 acres, are claimed by the St. Paul & Northern Pacific Railway Company, the present owner of that part of the said branch line grant to the State of Minnesota, extending from Watab to Brainerd, to appertain to the last-mentioned portion of said grant, and to rightfully belong to it, the said St. Paul & Northern Pacific Railway Company. And it, the said St. Paul & Northern Pacific Railway Company, has filed its bill of complaint, in the circuit court of the United States for the District of Minnesota, against the St. Paul, Minneapolis & Manitoba Railway Company and others, for the purpose of compelling the St. Paul, Minneapolis & Manitoba Railway Company to convey to it, the St. Paul & Northern Pacific Railway Company, all the said quantities of lands last aforesaid, as part of the grant appertaining to the said portion of the said road between Watab and Brainerd; and the said suit remains pending, and undoubtedly will, for some time remain pending and undetermined.

Furthermore, the said re-located part of the said branch line, commonly known as the St. Vincent Extension crosses the line of the Northern Pacific Railroad, near the western boundary of the State of Minnesota, at a point commonly known as Glyndon ; and a large part of the said lands in the place and indemnity limits, which had been certified to the said State, as accruing to the said branch line, have, for many years, been claimed by the Northern Pacific Railroad Company, as belonging to itself, under and by virtue of the grant made by Congress to aid in the construction of its line of road.

For the purpose of asserting such claim, in the year 1875, the said Northern Pacific Railroad Company filed its bill in the circuit court of the United States for the District of Minnesota, to compel the predecessor in interest of the St. Paul, Minneapolis & Manitoba Railway Company, to-wit; the St. Paul and Pacific Railroad Company, to convey to it, the Northern Pacific Railroad Company, the said lands, so claimed by the latter. The said suit remained pending in the said circuit court, until within the year last past, during which a final decree was rendered by the said court, in favor of the Northern Pacific Railroad Company, and against the said St. Paul & Pacific Railroad Company and the said St. Paul, Minneapolis & Manitoba Railway Company, adjudging that lands which had been so previously certified to said

* In the margin, opposite the above figures, were written in pencil, "543,559.88."

State, amounting in all to 369,009 & 47-100 acres, belonged, in equity, to the Northern Pacific Railroad Company, and vesting the title thereto in the Northern Pacific Railroad Company.

The said St. Paul Minneapolis & Manitoba Railway Company, as the successor in interest of the said St. Paul & Pacific Railroad Company, has not submitted to said decree, but has caused the same to be duly appealed to the Supreme Court of the United States, in which latter court the controversy remains pending.

By reason of the pendency of the said controversies with the St. Paul & Northern Pacific Railway Company and the Northern Pacific Railroad Company, respectively, it will be impossible to make a final and complete adjustment of the grant in favor of the said branch line, until the said controversies shall have been completed.

In addition to the uncertainties connected with the complete adjustment of the said grants for the said main and branch lines, growing out of the said adverse claims of the said St. Paul & Northern Pacific Railway Company and Northern Pacific Railroad Company, respectively, other uncertainties exist, which must be decided by the courts, before such adjustment can properly be completed.

Among others of the said uncertainties is this: As to whether or not the land grant in aid of the said main and branch lines is legally confined to the State of Minnesota, or extends across the boundary thereof, and into the Territory of Dakota, at the points where the said lines approach the western boundary of the State of Minnesota nearer than ten (10) miles.

The St. Paul, Minneapolis & Manitoba Railway Company is advised by counsel, and in good faith claims, that its grant is not confined to said State; and that it is entitled to lands lying within ten (10) miles of either side of its said main and branch lines of railroad, irrespective of political boundaries.

For the purpose of testing said question, the St. Paul, Minneapolis & Manitoba Railway Company, some years since, caused sundry suits to be instituted and prosecuted in the circuit court of the United States for the District of Minnesota. The said suits have been prosecuted to a final decree in the said Circuit Court, which decree was adverse to the Railroad Company; but the said suits have been removed by appeal to the supreme court of the United States, where they still remain pending. The same will be prosecuted by said railroad company, with all possible diligence and despatch, consistent with a due regard for its rights in the premises, to a final determination.

The said indemnity selections, made as aforesaid, include all the lands within the indemnity limits of the said main and branch lines subject to selection; and all said selections were made long since—the bulk of them many years since—and it is not, and has not been, owing to any fault or neglect, whatever, on the part of the St. Paul, Minneapolis & Manitoba Railway Company, that the adjustments of the said grant have not, before this time, been fully completed.

And the said Railroad Company respectfully suggests, that, as selections have been made for all lands within the indemnity limits, such lands have been placed *sub judice*, and, therefore, removed from the category of public lands, and cannot be made subject to adverse rights, by homestead or pre-emption entries, or in any other way, until the rights of the said Railroad Company thereto shall have been first examined and adjusted, and, therefore, that it would be improper and unlawful, at this time, to make any order, whatever, affecting or suspending, in whole or in part, any of the withdrawals which have heretofore been made of lands within the said Indemnity limits.

ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY COMPANY
By JAS. J. HILL
*President.*

STATE OF MINNESOTA,
*County of Ramsey, ss.*

James J. Hill, having been by me first duly sworn, did depose, that he is president of the St. Paul, Minneapolis & Manitoba Railway Company, mentioned in the foregoing statement, and that the matters set forth in said statement are true, to the best of his knowledge, information and belief.

JAS. J. HILL

Subscribed, and sworn to before me, on this 23rd day of June, A. D. 1887.

E. T. STEVENSON
*Notary Public, Ramsey Co., Minn.*

[NOTARIAL SEAL.

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ST. PAUL & NORTHERN PACIFIC RY. CO.

"Brainerd Branch."

Before the Hon. Secretary of the Interior.

The Saint Paul and Northern Pacific Railway Company, hereinafter called the Company, appears by its attorney Mr. Pearce Barnes, and answers the rule:—

The Company was formerly the Western Railroad Company of Minnesota. The corporate name was duly changed on or about the 9th day of May 1883.

(See certified copies of Articles and amended Articles of Incorporation, herewith submitted and marked "Exhibit A" and "Exhibit B" respectively.)

That the Company is entitled to the grants of land pertaining to the "Brainerd Branch."

(See, "Minnesota Railroad Grants" 2 Copp's Public Land Laws, 795; Patent to the Company April 21, 1879, recorded in the Department; and the facts hereinafter set forth.)

The revocation would injuriously affect the rights and interests of the Company, and, for the reasons hereinafter stated, should not be made; if, however, it is made, certain lands hereinafter described should be excluded from its operation.

FACTS.

The chief acts and joint resolutions of Congress under which the Company is entitled to the grant are the following—March 3, 1857, 11 U. S. Stats., 195; July 12, 1862, 12 U. S. Stats., 624; March 3, 1865, 13 U. S. Stats., 526; July 13, 1866, 14, U. S. Stats., 97; March 3, 1871, 16 U. S. Stats., 588; March 3, 1873, 17 U. S. Stats., 631; June 22, 1874, 18, U. S. Stats., 203.

For the purposes of this answer, we consider specially the last mentioned act first. By it, the time within which to complete the lines of road therein mentioned, a part of which was the line from Watab to Brainerd, to wit: the "Brainerd Branch," was extended; upon the conditions, however, that all rights of actual settlers and their grantees who had theretofore in good faith entered upon and actually resided on any of the lands prior to the passage of the act, or who otherwise had legal rights in any of them should be saved and secured to such settlers or other persons in all respects the same as if the lands had never been granted to and in the construction of the lines of road; and that the company taking the benefit of the act should, before acquiring any rights under it, by a certificate made and signed by the president and a majority at least of the directors, and sealed with the corporate seal, accept the conditions contained in the act, and file the acceptance in the Department of the Interior for record and preservation. Such acceptance was never filed and the act was in consequence held by the Department inoperative for every purpose and to confer no rights upon the settlers claiming thereunder. (Kemper *v.* St. P. & P. R. R. Co. 2 Copp's Public Land Laws, 805, 808.)

This decision was rendered December 11, 1876, as hereinafter shown, however, a great number of entries were claimed under the act, and in view thereof and of said decision and shortly before the 4th day of June 1877, F. R. Delano, Esq. acting on behalf of the Company wrote to the Governor that it had become the successor of the St. Paul and Pacific Railroad Company, Brainerd Branch (the facts relating to which will be hereinafter more fully set forth) and invested with that company's rights to the land grant pertaining to that Branch, and requesting that certain entries claimed under the last named act, a list of which was therewith sent, and which are hereinafter called "cancellation lands," should be cancelled in accordance with the decision in the Kemper case. On that day the Governor wrote to the Secretary of the Interior, referring to Mr. Delano's letter and enclosing the list of entries, which is on file in the Department. On or about the 25th day of June 1877 Mr. Land Comr. Williamson wrote to the Governor, enclos

ing therewith a letter of the Secretary concerning the Kemper case, saying that no action in respect to such cancellation could then be taken; that entries under the act must be denied until further legislation on the subject, or until a judicial forfeiture of the grant to the State had been declared; that the entries already allowed should not be perfected and no encouragement given to settlers that their claims would be allowed; and that as the company was not in a position to assert any rights, the matter must stand until relief should be afforded by the legislature or the judicial branch of the Government or until the completion of the road by the company rendered further action necessary. Clearly it was the view of the Department at this time that the company would be in a position to have the entries cancelled when the road was completed or a forfeiture to the State had been declared.

The principal state legislation by which the St. Paul and Pacific Company, afore-mentioned, had prior to March 1, 1877 become entitled to the lands appertaining to the "Brainerd Branch" can be found at the following references:—Passed May 19, 1857, Edgerton R. R. Laws, Minn., p. 10—Introduction; May 22, 1857, Same, p. 119; March 10, 1862, Same, p. 183; Feb. 6, 1864, Same, p. 190; Feb. 5, 1866, Same, p. 19

By the State act of March 1, 1877 (Laws Minn. 1877 p. 263), the privileges, franchises, rights, grants of land and property, theretofore held by the St. Paul and Pacific Railroad Company appertaining to the line of road from Watab to Brainerd (and constituting the "Brainerd Branch") were forfeited to the State without merger or extinguishment and were thereby preserved continued and conferred upon the terms and conditions in the act set forth; and by proceedings duly had and taken pursuant to the provisions of the act, the Company which was a corporation organized under the state law and which had been in existence since the year 1874, became the lawful successor to the grants of land privileges &c., of the St. Paul and Pacific Railroad Company so far as they appertained to that part, extending as aforesaid from Watab to Brainerd, of its line of road. The Governor certified to this fact on the 11th day of August 1877. (See certificate, Record "T", executive office St. Paul page 21, a certified copy of which will be produced if necessary.)

On the 15th day of January 1878, the Governor wrote to the Secretary of the Interior certifying to the due construction and completion by the Company of the line of road from Watab to Brainerd aforesaid, transmitting therewith a duplicate copy of the map verification and certifications required by law. Receipt thereof at the Department was acknowledged by the Acting Secretary by letter dated on or about March 27, 1878, which among other things stated that the said act of March 1, 1877 exempted out of the grant thereby made all lands actually and in good faith settled on prior to the date of the act; and requested the Governor to do the following things:—

1. Ascertain what lands had been so settled on.

2. Convey such lands to the United States for the benefit of the settlers.

3. Certify that the lands so conveyed were all the lands that had been so settled on.

4. Get a deed of relinquishment of such lands from the Company.

After the receipt of this letter and acting under the 10th section of the act of March 1, 1877, the Governor, on April 6th thereafter issued a proclamation that claimants should within forty days file their claims for lands pertaining to the "Brainerd Branch". The proceedings thereunder and thereupon had were very protracted. Commissioners were appointed to take and report the testimony to the Governor in all contested cases. These were very numerous, as a large part of the settlements were fraudulent, and the trials consumed much time. As a result of the proceedings, many of the claims were rejected by the Governor while others, amounting in the aggregate to 20,140.12 acres were allowed. Among those disallowed were the four entries characterized in the letter of Mr. Land Com'r McFarland to Pearce Barnes, Esq. dated "F" April 3, 1884 as actual subsisting entries; and such their disallowance was the reason why they were not included in the deeds of relinquishment hereinafter mentioned and have not been relinquished to the U. S. for the alleged settlers claiming settlement.

On or about December 6, 1878 the Company delivered to the Governor a deed for the lands allowed by him as aforesaid and he forwarded it together with a deed for the same lands executed by him to the U. S. for the benefit of the settlers and a letter, to the secretary of the Interior. The Secretary by letter to the Governor dated July 13, 1879 acknowledged receipt of the deeds and they are of record in the Department. On October 14, 1879 a deed similarly executed for a tract omitted from the original deed was sent to the Secretary and is likewise of record there.

Claims to only a part of the "cancellation lands" were allowed by the Governor under the proceedings above-mentioned. A few of the claimants, without the knowledge of the Company, succeeded in getting patents from the U. S. for an additional but much smaller part of them, a list of which lying within the Company's indemnity limits is hereto annexed, marked "Exhibit C". The Governor in his last-mentioned letter declined to pass upon the validity of the claims upon which these patents were based or to include the lands covered thereby in the deeds of relinquishment, since that was, as he claimed, beyond the scope of his authority. But a separate list of these patented lands was forwarded by the Governor to the Secretary about the time when the deeds were sent, as aforesaid, and is on file in the Department. The Company claims that the entries upon which these patents were based were fraudulent and void in law.

All the "cancellation lands" other than those deeded by the Governor and patented, as aforesaid, and which lie within the Company's indemnity limits are included in a list hereto annexed, marked "Exhibit D".

It appears from the records of the Department that there were as early as April 3, 1884 (see letter "F" of that date hereinbefore referred to) subsisting claims to only a part of the lands included in "Exhibit D", a list of which part is hereto annexed and marked "Exhibit E".

In all respects the Governor complied with the requests contained in the letter to him from the Acting Secretary of March 27, 1878 aforesaid.

Some time prior to February 19, 1879, the land com'r of the Company prepared two lists of lands including the cancellation lands in them. One list covered the granted, the other the indemnity lands to patents for which the Company was as he conceived entitled. Upon presentment of these lists at St. Cloud the local land officers refused to certify the lists to the Department as he requested them to do, because the "cancellation lands" were included in them. Thereupon the land com'r prepared three lists, one for the granted, one for the indemnity and one for the "cancellation" lands, and offered them to such officers for certification. They certified the first two. All objections, known to the Department, to the approval by the Secretary of the lands due to the Company having been removed, he directed the General Land Office on Feb. 18, 1879 to prepare lists of lands enuring to the grant to the Company and submit them to him for approval. On April 8, 1879 a list containing 121,502.31 acres found to be vacant and lying within the granted limits was submitted to and on the 11th day of April 1879 approved by the Secretary. On April 21, 1879 a patent for the entire quantity was duly executed by the United States to the State for the benefit of the Company.

See for a history of the proceedings leading up to this patent "Minnesota Railroad Grants" before cited, 2 Copps P. L. L. 795.

Thereafter during the year 1879 the State made a written demand now on file in the Department for a patent of lands embraced in the indemnity selection of the Company, afore-mentioned, which covered 153,089.34 acres and which is also on file in the Department. The Land Com'r reported the matter to the Secretary, and asked instructions about the amount of indemnity to, and for what it should, be allowed. The Secretary thereupon took the opinion of the Attorney General. (See, Same, p. 796.)

The case was argued at length before the Secretary and Attorney General on appeal from the decision, I believe, of Assistant Attorney General Marble. It was held on appeal that indemnity should be allowed for such sections or parts of sections as had been sold or pre-empted prior to the attachment of the grant whether sold or pre-empted before or after the date of the granting acts, but should not be allowed for lands reserved by competent authority prior to the date of the granting acts. George Gray, Esq., counsel for the Company and W. P. Clough, Esq., of counsel and acting on behalf of the State argued the case on appeal and thereafter during the same year they or one of them together with Mr. Willis Drummond ,jr. we believe, then connected

with the Department went over the indemnity list and threw out a part of the lands contained in it. This was preparatory to presenting the list to the Secretary according to his directions. They made a new list of the indemnity lands to be patented, which is, as we are informed, on file in the General Land Office. Eight years have elapsed and the Department has taken no action whatever with regard to patenting the indemnity lands. The Company waited patiently for the matter to be taken up until on or about the 19th day of December 1883 when the attorney of its land grant matters attended at the General Land Office and by personal interviews with the Land Com'r urgently requested that the matter might be pressed to a conclusion. While admitting the justice of the request and admitting that the patent should issue, he declined to take up consideration of the question, on account, as stated by him, of the pendency of legislation looking towards a forfeiture of the grant because the road had not been completed within the time limited therefor by Congress. Thereafter at the suggestion of the Land Com'r and on or about June 7, 1884, a full statement of the facts and circumstances relating to the Company's claim for an indemnity patent, and dated some time prior thereto, was prepared and forwarded to the Department, and is therein on file and reference is hereby made to it. The attorney on or about June 24, 1884 again attended at the General Land Office and endeavored to get the matter adjusted, but without avail. Similar efforts were made by personal attendance of the attorney on or about May 14, 1885. The Congress before which the forfeiting legislation had been pending as aforesaid was then dead, and it was hoped that this fact might induce the Department to commence action with regard to the indemnity question, but the Land Com'r was unwilling to do so for the reason stated, among others, that similar forfeiting bills would be undoubtedly introduced at the session then next. On February 17, 1886, in an extended letter written by the attorney to the Secretary on several subjects, his attention was again called to the fact that no action had been taken in regard to the indemnity patent and such action was again requested but was refused. The attorney again personally attended at the General Land Office in December 1886 but without result. In addition to the foregoing matters, various minor communications have from time to time during the last three years been had with the Department concerning the indemnity lands and bearing upon the question of the issuance of a patent therefor, but, as before stated, nothing has come of it.

From time to time also, efforts have been made by the Company to have the Department go into the question arising out of and take action concerning the "cancellation" entries of lands so that the Company could thereby be placed in a position to clear up its title to them. The question was discussed by the Land Com'r and others connected with the General Land Office and the attorney on every occasion but one when he attended there as hereinbefore set forth.

See also a letter on the subject (to which reference is hereby made) by the attorney to the Secretary on or about Feb. 17, 1886, giving details concerning these lands and requesting a cancellation of the entries. The General Land Office declined to take action for substantially the same reasons as prevented it in the question of the indemnity patent.

By reason of certain provisions of the act of March 1, 1877 before referred to, and the act amendatory thereof passed March 9, 1878 (See Laws Minn. 1878) almost a hundred thousand acres of land lying partly in the granted, and partly in the indemnity, limits of the Company's grant were selected by the Governor for sale by him to meet certain "construction claims" for work materials &c, furnished in building the "Brainerd Branch" and the "St. Vincent Extension". The Company sought to enjoin this selection but was defeated. (See 28 Minn. Reports 1.)

About seventy thousand acres so selected were actually sold to various persons and deeds therefor given by the Governor. By purchases subsequently made from these persons all the right that they had to a very large part of the lands so sold came to be owned by the Company.

At the time the indemnity selection was made by the Company and certified from St. Cloud as hereinbefore mentioned, all the lands vacant and subject to selection were included therein. From the letters hereinbefore referred to it will appear, and in fact it is known to the Department, that the indemnity lands which it is possible for the Company to get fall far short of the quantity to which, by reason of losses in the granted limits, it is entitled.

In view of the facts, therefore the Company respectfully submits:—

1. That no revocation of any of the orders of withdrawal of lands within the indemnity limits of the Brainnerd Branch should be made; for there are substantially no lands upon which the revocation would operate without in some considerable degree prejudicing the Company's rights. The title and the position of the Company concerning the lands included in Exhibits "C" "D" and "E" respectively might be seriously affected by the order of revocation. And the same can be said with regard to the lands which were selected and sold by the Governor, and the interest in which subsequently passed to the Company. Certainly that is so with regard to those of them (a list of which will be furnished if necessary) that lie within the indemnity limits and have not been certified or approved to the State.

2. If for any reason, any lands, not included in the indemnity selection made by the Company as hereinbefore stated, have since become selectable, the Company should not be precluded from selecting them.

3. Certainly no revocation should be made until all these matters are more thoroughly adjusted. If it *is* made, then all the lands included in Exhibits "C" "D" and "E" respectively and the lands a list of which will be furnished as aforesaid should all be excluded from the

operation thereof, and the Company should be left in the same position as to them and each of them, as if the revocation had not been made.

All of which is respectfully submitted this 27th day of June 1887.

PEARCE BARNES,
*Att'y for the Company, 49 Nassau St., New York City.*

"EXHIBIT C."

| Description. | Sect. | Town. | Range. | Acres. |
|---|---|---|---|---|
| SW¼ | 29 | 42 | 29 | 160.00 |
| NW¼ | 15 | 42 | 30 | 160.00 |
| E½ of NE¼ and NE¼ of SE¼ | 7 | 130 | 31 | 120.00 |
| S½ of SW¼ and NE of SW¼ and NW¼ of SE¼ | 19 | 42 | 29 | 170.42 |
| E½ of SE¼ and S½ of NE¼ | 19 | 42 | 29 | 160.00 |
| NW¼ | 29 | 42 | 29 | 160.00 |
| Total | | | | 930.42 |

"EXHIBIT D."

| | | | | |
|---|---|---|---|---|
| S½ of SE¼ | 29 | 40 | 30 | 80.00 |
| NE¼ of NE¼ | 19 | 42 | 29 | 40.00 |
| E½ of SW¼ SW¼ of SE¼ | 15 | 22 | 30 | 240.00 |
| NW¼ and W½ of SW¼ | 33 | 38 | 28 | 240.00 |
| S½ of NW¼ NE¼ of NW¼ | 5 | 128 | 32 | 122.85 |
| SE¼ | 35 | 129 | 32 | 160.00 |
| Total | | | | 882.85 |

"EXHIBIT E."

| | | | | |
|---|---|---|---|---|
| E½ of SW¼ SW¼ of SE¼ | 15 | 42 | 30 | 240.00 |
| W½ of SW¼ S½ of NW¼ | 33 | 38 | 28 | 160.00 |
| S½ of NW¼ NE¼ of NW¼ | 5 | 128 | 32 | 122.85 |
| Total | | | | 522.85 |

ST. PAUL & SIOUX CITY RAILROAD COMPANY.

Now comes the St. Paul and Sioux City Railroad Company, by Curtis and Burdett, its attorneys, and for answer to said rule says:—

I.—*It is beyond the power and the jurisdiction of the Secretary of the Interior, as the law stands on the statute book, to "restore to settlement" any lands within the indemnity limits of said company; certainly until the grant shall have first been finally adjusted.*

The act of Congress approved March 3, 1857 (11 Stat., 195) grants to Minnesota, for the benefit of this company, every alternate section of the public lands designated by the odd numbers for six miles in width on each side of said road, and declares that if, at the time the line of road is definitely fixed, the United States has sold any sections or parts of sections granted as aforesaid, then it shall be lawful for the State to select from the lands of the United States nearest to the tiers of sections so granted in place, so much land, in alternate sections, or parts

of sections, as shall be equal to such lands as the United States had sold, or otherwise appropriated, or to which the rights of pre-emption have attached, provided that the land to be so located shall, in no case be further than fifteen miles from the line of said road.

The line of road of the company having been definitely located the land department, under date of March 21, 1858, issued an order withdrawing from market and settlement all the odd-numbered sections of public lands lying within fifteen miles of the line of said road.

This was the condition of affairs when Congress passed the Act of May 12, 1864, the 7th. section of which grants to the State of Minnesota for the benefit of this company, "four additional alternate sections per mile, to be selected upon the same conditions, restrictions and limitations as are contained in the Act of March 3, 1857," "Provided, that the land to be so located by virtue of this section may be selected within twenty miles of the line of said road, but in no case at a greater distance therefrom."

On the 3rd. day of March, 1865, Congress passed another Act (13 Stat., 526) amendatory of the grant made the State of Minnesota by the Act of March 3, 1857, and increasing the limits in place to 10 miles and those for indemnity purposes to 20 miles. The 7th. section of said act is in the following words:

SEC. 7. *And be it further enacted*, That as soon as the governor of said State of Minnesota shall file or caused to be filed with the Secretary of the Interior maps designating the routes of said roads and branches, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

The withdrawals for the benefit of this company made by the Land Department subsequently to the passage of the said acts of 1864 and 1865, were those of August 10, 1865 and October 10, 1869, referred to in the rule to show cause.

This respondent says, and submits, that so far as indemnity lands are concerned the acts of 1857, 1864 and 1865 being in *pari materia*, the last two amendatory of the earlier grant, and all operating upon precisely the same subject matter, that is to say upon the selection of indemnity lands, stand and must be construed together as one enactment, and into that enactment in its entirety is incorporated the provision which Congress saw fit to enact in the 7th section of the act of March 3, 1865, viz, the direction to the Secretary of the Interior to withdraw from market the lands embraced by the provisions of the act.

Hence it follows:—

1. That the withdrawal of all the indemnity lands lying within twenty miles of the line of this road, was a legislative withdrawal.

2. That when the Secretary of the Interior issued the necessary executive or administrative order to carry that withdrawal into effect, he exhausted all and singular the power of the Land Department over the subject matter.

3. That as the public lands of the United States are only disposable under the direction of Congress, it requires legislation by that body before its enactments dedicating the lands in question to this particular purpose can be repealed, modified or set aside.

And out of these three propositions flows, necessarily, another one, viz:

That Congress not having repealed its legislation with respect to the grant for the benefit of this company, any attempt on the part of an executive officer, by way of the revocation of the act of his predecessor which carried out the express direction of the Congress in withdrawing the lands from market is nothing short of an attempt at legislation, and consequently an act not only in direct opposition to the expressed direction of Congress, but in effect the defeat of the will of that body.

Nothing can be plainer, from the entire legislation of Congress in making grants of the public lands to aid in the building of railroads, than that body intended that the lands set apart for the purpose contemplated should be devoted to it absolutely, in order that each grantee might acquire precisely that amount of land which the grant conferred. If this be not so, then whence the necessity of ordering the lands within the limits which the company is authorized to go for indemnity to be withdrawn from market. The term "market" in respect to the public lands means something specific, definite and certain, that is, disposition either under the settlement laws or by private entry. Hence Congress by ordering the lands to be withdrawn from market, intended that until this railroad grant was fully settled and adjusted as far as possible under its terms, no one other than the grantee should have opportunity to secure the lands so withdrawn. There can be no doubt of this for as Congress was careful to exclude from the operation of the grant every single tract to which any right, however inchoate, had attached at the time of the definite location of the line of the road, it must necessarily follow that the indemnity lands being once withdrawn and the right of the company to select them, if necessary, thus recognized and vested the land cannot be lawfully restored to market until the grant shall have been adjusted in its entirety and the object of the legislature thus accomplished.

We submit and maintain that a search through the statute books for authority conferred upon the Secretary of the Interior to restore to market lands which have pursuant to the direction of Congress been withdrawn from market for the benefit of a land grant railroad company will be in vain unless the grant had been finally and definitely adjusted, or, on the other hand, Congress had seen fit to declare a forfeiture.

The duty under the law of the Secretary of the Interior is to adjust the grant—to execute it and carry it out as Congress has made it. It is no part of his duty to take any measures whatever which may directly or indirectly, defeat the appropriation of the lands by Congress.

So long as the lands have by the express enactment of that body been withdrawn from market he has no power or right to dispose of them except in the manner pointed out in the granting act, for that act expressly takes them out of the category of public lands ordinarily disposable by the land department.

It is the duty of the Secretary of the Interior to adjust the grant, and in that adjustment to ascertain what particular tracts within the indemnity limits the company may, and will, require to make up any loss or losses within the limits in place. The law makes it his duty to approve indemnity selections if they are made in accordance with the terms and requirements of the grant, and so long as there is pending in the Land Department, under his direction any question of selection of indemnity lands, or any question as to whether a particular tract within the granted limits was excepted from the grant (in which event the selection of indemnity land may have to be resorted to) just so long is the Secretary of the Interior absolutely forbidden by the very terms of the act from taking any step or steps which will restore the indemnity lands to market or which may directly or indirectly result in the defeat not only of the grant, but of the will of Congress in making it.

That *final adjustment* of the grant, and the settlement of all the questions of fact respecting it, is the duty of the Secretary of the Interior, and not an attempt to restore the indemnity lands to market *first*, and then attempt to adjust said grant afterwards, is clear from the recent legislation of Congress.

On March 3, 1887, Congress passed an act entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes."

The first section of that statute enacts as follows:

That the Secretary of the Interior be, and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

Under that statute we submit and insist that it is the duty of the Secretary of the Interior to adjust the grant *before* he shall attempt to take measures which may result in the defeat of its adjustment. Congress does not, in that act, say to the Secretary that he shall restore the lands to market or to settlement: on the contrary, he, in carrying it out, will be required to first ascertain what lands were lost to the company within its granted limits; secondly, what lands within the indemnity limits have been or may become necessary to be selected in lieu of said lost lands: third, what tracts of land in the granted limits are claimed adversely to the company and as to which claim no final decision has been made by the Land Department. Having ascertained all of these facts and having further determined the rights of the company in each and every such case, the Secretary then, so far as this

company is concerned, may take such steps as he may see fit, to restore to market and settlement such lands as may then remain over and above those adjudged to the company; but until such final adjustment is made, and all the questions affecting the rights of this company, as an entirety, to the full quota of lands granted to it by Congress shall be settled and determined, it is respectfully submitted that any attempt to restore the indemnity lands to market or to settlement is not only in conflict with the granting act, but with the evident intent of Congress in enacting the act of March 3, 1887.

Possibly it may be suggested that the 7th. section of the Act of March 3, 1865, was not intended by Congress to have the force and effect of an absolute withdrawal—legislative in its character—from market of the lands lying within the indemnity limits but was merely intended to set aside from acquisition by others, the lands in the granted limits.

If so we reply, that it is evident that Congress never intended to so limit the operation of that section, for the title of the grantee to the lands embraced is by express and appropriate words of grant, and not by or through selection.

The supreme court has, in a long line of decisions, over and over again held that so far as the limits in place are concerned, the words "there be and is hereby granted" constitute a grant *in præsenti*, which passes the title out of the United States immediately upon the filing of the map of definite location of the line of the road, such title in the grantee relating back to the date of the grant.

In Van Wyck *v.* Knevals, (106 U. S. 360) the court in speaking of the direction in the statute respecting the withdrawal of the lands from market by the Secretary of the Interior, said:

"But if he should neglect his duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the Secretary's order, or upon notice of the withdrawal being given to the local land officers. Congress, which possesses the absolute power of alienation of the public lands, has prescribed the period at which other parties than the grantee named shall have the privilege of acquiring a right to portions of the lands specified, and neither the Secretary nor any other officer of the land department can extend the period by requiring something to be done subsequently, and until done, continuing the rights of parties to settle on the lands as previously. Otherwise it would be in their power, by vexatious or dilatory proceedings, to defeat the act of Congress, or at least seriously impair its benefit."

Thus it follows that if the right of the company to the lands within the limits in place does not depend upon an order for their withdrawal being given by the Secretary of the Interior, it is clear as Congress can not be presumed to have used the words "withdraw from market" in vain, that they necessarily refer with full force and meaning to the indemnity lands, the title of the company whereto depending upon selec-

tions, and their reservation from settlement and from market being directed by Congress for that express purpose

II.—*Even if there is power in the Secretary of the Interior to revoke the withdrawals it will be against good policy and in derogation of the rights of the company to exercise it.*

The records of the land department will show that the beneficiaries of this grant have proceeded with singular diligence to make claim to the lands inuring to them under it, and have omitted no act they might lawfully do nor any duty devolving upon them which was at any time necessary to a final adjustment, and the consequent release of any lands of the United States, if any there were, embraced by the withdrawals but not inuring to the grant.

The records and published reports of the General Land Office show that there are indemnity selections, duly made by the company, still awaiting action, and that there are many applications by settlers, real or pretended, calling in question the rights of the company to particular tracts as well in the granted as in the indemnity limits, which must have due examination and determination. It is possibly true that along the line of this road there are no lands to which the legal title remains in the United States save only such as are covered by the pending selections of this company, and that any order of restoration would be without the immediate effect of uncovering lands subject to any form of entry or appropriation under the public land laws. But it is respectfully and urgently pointed out that such order of restoration might, nevertheless, work wrong and injustice to the company, and, at the same time, tend to embarrass and delay the Honorable Secretary in the discharge of duties now paid upon him by law.

The adoption, in 1877, of the rule that losses occurring within the granted limits must be specifically ascertained before the right to select indemnity is acquired, which is still the rule of the Department, is an absolute bar against the complete exercise of the right of selection until such time as the Land Department shall, by proceeding to a final adjustment, determine what the losses within the granted limits have been.

In the absence of such a rule it will be perceived that neither the United States nor any beneficiary company can know the extent of the losses in the primary or granted limits, and of the resulting rights in the secondary or indemnity limits until the Land Department has finally adjudicated every claim adverse to the grant which has been duly presented and now remains pending,

In addition to this there has been recently been added another element of uncertainty as to what the quantity of indemnity may finally be, for the act of March 3, 1887, hereinbefore referred to, whilst it authoritatively requires that adjustment be immediately proceeded with, introduces new factors into the problem by requiring suits to be brought to set aside the patenting or certification of tracts which, for any cause,

may appear to the Secretary to have been erroneously patented or certified; and the reinstatement of the homestead or pre-emption entry of any bona fide settler erroneously canceled on account of any railroad grant or withdrawal.

It seems to us that this state of facts, which is not merely imminent but a present factor in the situation is the very state of case which suggested the policy and necessity of withdrawals of indemnity limits, and which has justified Congress in maintaining those which were made (as in this case) under its order, and that a revocation of the order of withdrawal at the present time may result in depriving the company of the remedy which the law intended should run along with its rights until there was final satisfaction of them.

The revocation of the orders of withdrawal will mean, among other things, that if in the process of adjustment a selection is, for want of observance of some rule as to the manner of selection or other cause canceled, that the company must run a race with all others for the acquisition of the tract by new selections although the grant may be short many hundreds of acres.

But the proposed revocation of the orders of withdrawal, will, if carried into effect, tend to delay the final adjustment promised and directed by the act of March 3, 1887 aforesaid.

An intimation given sometime since that under some new plan of adjustment this and other companies would be found to be in possession of lands in excess of the respective grants, set the tide of so-called settlers towards the granted lands, and added to the accumulation of cases pending in the General Land Office which must have their turn for attention. The revocation of the orders of withdrawal will seem to the honest but ignorant few, and to the speculative many an invitation to go in and possess the land, and will be likely to result in the assertion of as many claims as there are unoccupied tracts within the indemnity limits: all of which must have a day in court and thus add to the burden, cost and delay of the final adjustment.

For the reasons above given we respectfully request and submit that the rule to show cause be discharged.

ST. PAUL AND SIOUX CITY R. R. CO.
By CURTIS & BURDETT,
*Its Attorneys.*

WASHINGTON, D. C., *June 25th*, 1887.

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SIOUX CITY & ST. PAUL R. R. CO

To the Honorable L. Q. C. LAMAR,
*Secretary of the Interior.*

The Sioux City and Saint Paul Railroad Company in answer to the rule entered by the Secretary of the Interior on the several land grant railroad companies to show cause on or before the 27th day of June,

1887, why the several orders of withdrawal from settlement of the lands within the indemnity limits of their several roads, mentioned in the printed circular from the Department of the Interior, dated Washington, May 23d, 1887, and signed by the Secretary of the Interior, should not be revoked and the lands therein embraced restored to settlement, respectfully states and shows that the order of withdrawal from settlement of the lands within the indemnity limits of its road should not be revoked nor the lands therein embraced restored to settlement for the following reasons:

By express provision of the act of Congress making the grant of lands for the road constructed by the Sioux City and Saint Paul Company, entitled, "An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State," approved May 12, 1864, it was made the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of the act as soon as the Governor of the State of Iowa should file or cause to be filed with the Secretary of the Interior maps designating the route of the road. U. S. Stats., Vol. 13, p. 72, Sec. 5.

The lands were withdrawn from market in pursuance of this act of Congress by letter of August 26, 1867, received at the local land office September 2, 1867. Sen. Ex. Doc. No. 124, 2d Sess., 49th Cong. page 44, papers 71 and 72.

No act of Congress has authorized the restoration to market of any of the lands.

The Secretary of the Interior acting within his jurisdiction, and in the exercise of his judicial discretion, directed that patents issue to the State of Iowa for the benefit of the Sioux City and Saint Paul Railroad Company for lands described in said patents amounting to 407,880.01 acres, see Sen. Ex. Doc. No. 124, 2d Sess. 49th Cong., papers 85, 87, 91, 93, 95, pages 50–53, and patents were duly issued by the United States conveying the same to the State of Iowa for the purpose aforesaid, under the act of Congress. Of this amount the Chicago, Milwaukee and Saint Paul Railway Company have received by decree of the supreme court—Milwaukee Co. *v.* Saint Paul Co., 117 U. S. 406—79,435.41 acres, leaving but 328,444.60 acres held by the State by patent from the United States for the benefit of and applicable to the Sioux City and Saint Paul Railroad.

The State of Iowa patented to the Sioux City and Saint Paul Railroad Company 322,421.81 acres, of the amount thus patented 41,689.11 acres are embraced in the lands decreed by the supreme court to the Chicago, Milwaukee and Saint Paul Company, in the case above mentioned, leaving 280,732.70 acres patented by the State of Iowa to, and held by the Sioux City and Saint Paul Company. By the same decree of the supreme court the Sioux City and Saint Paul Company received of the lands conveyed to the State for the use of the company but which the Governor refused to patent to the company 20,980.68 acres, making the

total amount received by the Sioux City and Saint Paul Company by patent from the State and under the decree of the supreme court 301,-713.38 acres. The Sioux City and Saint Paul Railroad Company constructed on and prior to February 4, 1873, and completed in running order 56¼ miles of road, to-wit: five consecutive sections of ten miles each, for which it earned in accordance with the terms of the grant 320,009 acres, and an additional section of 6¼ consecutive miles from the end of said five ten mile sections to LeMars, within the time prescribed by the act of Congress by which it has earned the additional amount of 40,000 acres, making in all 360,000 acres.

After the completion of the road to LeMars, as above stated, the legislature of Iowa passed the following act entitled "An act authorizing and directing the Governor to certify to the Sioux City and Saint Paul Railroad Company certain lands named therein; approved March 13, 1874."

Section 1. That the Governor of the State of Iowa be, and he is hereby, authorized and directed to certify to the Sioux City and Saint Paul Railroad Company all lands which are now held by the State of Iowa in trust for the benefit of said railroad company in accordance with the provisions of Section 2 of Chapter 144 of the laws of the Eleventh General Assembly.

Section 2. All acts and parts of acts in conflict with the provisions of this act are hereby repealed. Laws of Iowa, 1874, Ch. 34.

Eight years after the passage of this act and one year after the expiration of the period designated in the act of Congress for the State to construct the road if the companies should make default, the legislature of Iowa passed the following act, approved March 16, 1882, entitled, "An act to resume all the lands and rights conferred upon the Sioux City and Saint Paul Railroad Company by or under an act of Congress approved May 12, 1864, the lands not heretofore earned by said company."

SECTION 1. That all lands and all rights to lands granted or intended to be granted to the Sioux City and Saint Paul Railroad Company by said acts of Congress and of the General Assembly of the State of Iowa which have not been earned by said Railroad Company by a compliance with the conditions of said grant be and the same are hereby absolutely and entirely resumed by the State of Iowa and that the same be and are absolutely vested in said State as if the same had never been granted to said Railroad Company, and two years thereafter by act approved March 27, 1884, the legislature of Iowa enacted as follows:

SECTION 1. That all lands and all rights to lands resumed and intended to be resumed by chapter one hundred and seven (107) of the acts of the nineteenth general assembly of the State of Iowa are hereby relinquished and conveyed to the United States.

SECTION 2. The Governor of the State of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the State to aid in the construction of

said railroad and which have not been patented by the State to the Sioux City and Saint Paul Railroad Company and the list of lands so certified by the Governor shall be presumed to be the lands relinquished and conveyed by Section 1 of this act: *Provided*, that nothing in this section shall be construed to apply to lands situated in the counties of Dickinson and O'Brien.

On the 12th of January, 1887, the Governor of Iowa transmitted to the Secretary of the Interior a document purporting to be a complete and accurate list of the lands relinquished and conveyed to the United States by the aforesaid act of the general assembly of said state with his certificate attached thereto.

The list embraces descriptions of lands by government sub-division; 40 acres in Sioux County, 11,780.08 acres in Plymouth County and 14,197.25 acres in Woodbury County in all 26,017.33 acres.

Upon this state of facts and upon the facts appearing upon the records of the Interior Department, the Sioux City and Saint Paul Railroad Company claims and urges:

1.

That the United States have conveyed by patent to the State of Iowa for the use of the Sioux City and Saint Paul Railroad Company the lands embraced in the grant and in the order of withdrawal and therefore has no authority to open or restore any portion of them to settlement.

2.

The withdrawal of the lands was by express provision of law and was for the purpose of enabling the companies building the roads to obtain all the lands to which it was entitled by the construction of its road. The Sioux City and Saint Paul Railroad Company built its road in good faith to LeMars and completed it more than fourteen years ago, and it has been operated ever since as a part of a great trunk line of road. By reason of litigation arising out of conflicting claims between it and the Chicago, Milwaukee and Saint Paul Railway Company and the adverse action of Iowa, the trustee holding the title to the lands, the Sioux City and Saint Paul Railroad Company has received and now holds the title by patent, and decree of the Supreme Court of the United States, to but 301,713.38 acres of the lands granted by the act; whereas it claims that it is justly and lawfully entitled to receive for five sections of ten miles each from the south line of Minnesota 320,000 acres and for the additional section of 6¼ miles from the end of said five ten mile sections to LeMars 40,000 acres, making in all 360,000 acres. There remains less than 27,000 acres applicable to this road. If, therefore, the claim of the Company should be sustained there would be but 8,485.38 acres to apply upon the 6¼ miles section leaving a deficiency of more than 31,000 acres. Both the interests and the efforts of said Company, respondent, have

been to procure a settlement of its rights and a title to the land earned by it. The revocation of the order of withdrawal and restoration of the lands to settlement by the government, would obstruct, hinder and delay the respondent in its efforts to obtain its rights and introduce new complications and give rise to further litigation in regard to the lands and protract and postpone the final determination of the matter. The purpose of the withdrawal not yet being accomplished, notwithstanding the efforts of the respondent to accomplish it, the order should not be revoked.

3.

The Sioux City and Saint Paul Railroad Company having completed its road to LeMars, and the United States having patented these lands to the State of Iowa for the use of said Company in 1873, the act of the Iowa legislature approved March 13, 1874, directing the Governor of the State to certify to the Sioux City and Saint Paul Railroad Company all lands which are now held by the State in trust for the benefit of said railroad company in accordance with the provisions of Section 2 of Chap. 144 of the laws of the Eleventh General Assembly, was a conveyance as well as a law and conveyed these lands, including those embraced in the Governor's certificate hereafter mentioned to the railroad company. The subsequent acts passed respectively eight and ten years afterwards, purporting to resume the lands as not earned and relinquish them to the United States, and the certificate of the Governor on the 12th of January, 1887, in pursuance thereof, were each invalid and of no effect. See also points 6, 7, 8, 9, 10 and 11, in "Exhibit A" hereto attached.

4.

The act of Congress, approved March 3, 1887, providing for the adjustment of land grants made by Congress to aid in the construction of railroads, &c., expressly provides that the act shall not be construed as a declaration of forfeiture of any portion of any land grant for conditions broken or as authorizing an entry for the same. Stats. 49 Cong. 2d Sess., Chap. 376, Sec. 4, last proviso. The certificate of the Governor of Iowa and the legislation authorizing it are all based upon the forfeiture of the lands by breach of the conditions of the act of Congress and entry for conditions broken. The United States, therefore, cannot receive the conveyance.

A proceeding is now pending before your honor in the matter of the application to open to settlers certain lands in Plymouth, Sioux and Woodbury Counties, Iowa, certified by the Governor of Iowa to the Secretary of the Interior, which involves the same lands which would be affected by the revocation of the order of withdrawal referred to, and involved in the rule to show cause now under consideration. This respondent in the hearing of the application referred to submitted to

your honor a statement of facts and brief and argument against the granting of such application which is hereto attached, marked "Exhibit A," which respondent makes a part of his answer to this rule.

All of which is respectfully submitted,

E. F. DRAKE,
*Pres. S. C. & St. P. R. R. Co.*

S. J. R. McMILLAN,
*Att'y for S. C. & St. P. R. R. Co.*
ST. PAUL, *June* 23, 1887.

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SOUTHERN PACIFIC R. R. CO.

The order, addressed to this and sundry other railroad companies, is as follows:

DEPARTMENT OF THE INTERIOR,
*Washington, May* 23, 1887.

It appearing from the records of this Department that orders withdrawing lands from settlement under the public land laws within the indemnity limits of the following list of land-grant railroads are still existing, and that these several roads have not informed this Department to what extent they are entitled to lands within such indemnity limits by reason of those lost in place of their respective grants, and that ample time has been given them to assert their rights in this behalf.

* * * * * * *

And it now appearing that no sufficient reason exists for longer continuing in force said several orders of withdrawal or that a time certain should be fixed within which the rights of these several roads should be asserted and that lands to which said railroad companies are not entitled in said indemnity limits should be restored to settlement, now, rule is hereby entered on said several railroad companies to show cause, on or before the 28th day of June, 1887, why said several orders of withdrawal should not be revoked or such other action taken as shall speedily restore such lands to the public domain for settlement.

Returnable before the Secretary of the Interior on the 28th day of June, 1887, at 10 o'clock a. m.

L. Q. C. LAMAR,
*Secretary.*

The most material requirement upon this company in the above, is, to set forth the facts and reasons why the withdrawals of public land along its line, made to aid the final adjustment of its land grants, should not be revoked.

Passing by some of the statements in this order of 23d May, which we might except to or explain, we proceed to make a summary of the facts and law of the case of said company, principally relating to its main line of road.

The suggestion of this order is that lands to which said company is not entitled in said indemnity limits should be restored, and the con-

verse of this proposition may be assumed, that lands to which it is entitled should remain withdrawn.

We may be excused here for referring to the act of Congress approved March 3, 1887, public No. 162, pamphlet, p. 556, by which it is enacted "that the Secretary of the Interior be, and is hereby, authorized and "directed to immediately adjust * * * each of the railroad land "grants made by Congress to aid in the construction of railroads and "heretofore unadjusted."

The grants to the Southern Pacific Railroad Company of California come within the language and intent of this enactment. The "adjustment" is made a present duty of the Secretary, and we propose to show—

I.

That in order to properly perform this duty the indemnity withdrawals for this company must be for the present maintained.

The fundamental proposition in the case is that the grant to the company is one of quantity within limits, both quantity and limits being fixed by the location of the line of road. The quantity in primary limits is the quantity of the grant, which has been only approximately ascertained.

Assuming, however, the computations of the General Land Office, as made to the Department in annual and other reports, which have been given to the public in executive documents, as a basis, it will appear that all the land within both limits, which is of the description granted, will be required to satisfy the just demands of the company.

The grant is in these words:

There be, and is hereby, granted * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, *and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State*, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from pre emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land office, and whenever, prior to said time, any of said sections or parts of sections shall have *been granted*, sold, reserved, occupied by homestead settlers or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, etc.

This indemnity for losses within granted limits is unusually liberal, probably because of the denial of money subsidy along a route so difficult of construction. It gives lieu lands for the lands "granted prior to said time," as well as for those of other descriptions, for which indemnity is usually given.

The provision for indemnity covered the losses already then known to exist, as well as those to be ascertained in future under the exemptions

from the grant. It covered the known loss by conflict with the prior grant and withdrawal for the Central and Western Pacific roads—twenty-five miles off one end of our road—and the State swamp grant under the act of 28th September 1850, and the supplemental law of 22d July 1866; the latter act, in the minds of the Land Committees at the time, resulting in this allowance of indemnity for swamp lands confirmed to the State by a prior law of the same session of Congress.

It is also true that large quantities of land along the first fifty miles of the Southern Pacific main line and along the branch line north and south of Los Angeles, had been sold and located prior to the grant, and large areas were covered by Mexican grants, so that only a small percentage of the quantity of the grant could be found opposite the completed road in those localities.

That the grant is one of *quantity per mile of road* is made plain by the decision of the United States Supreme Court in the case of the Burlington and Missouri River Railroad *v.* The United States (98th U. S. Reps., 334).

It will be here noticed that immediately upon the filing of our map of main line the Secretary of the Interior, Mr. Browning, March 19, 1867, in his letter of that date to the Commissioner of the General Land Office, construed this grant as one of odd sections within twenty miles of the road, and the ten additional miles as limiting the boundaries from which the indemnity lands must be taken.

DEPARTMENT OF THE INTERIOR,
*Washington, March 19th,* 1867.

SIR: Under date of January 3d, 1867, a map showing the designated route of the Southern Pacific railroad in California, filed under the act of Congress approved July 27th, 1866, was sent to you for appropriate action.

If a withdrawal of lands has not been ordered on account of said road, you will cause the necessary instructions to be issued to the local land officers to withdraw the odd sections within the granted twenty miles on each side of said road, as shown on the map before mentioned, and also withdraw the odd sections outside of the twenty miles and within thirty miles on each side from which the indemnity for lands disposed of within the granted limits is to be taken.

* * * * * * *

The withdrawal will be ordered to take effect upon the receipt of your instructions at the local office.

Very respectfully, your obedient servant.

O. H. BROWNING,
*Secretary.*

Hon. JOS. S. WILSON,
*Commissioner of the General Land Office.*

The withdrawals were ordered by the Commissioner according to these directions of the Secretary, under date of March 22, 1867, addressed to the local officers at San Francisco, Visalia, and Stockton

The construction thus given to the grant in 1867 has been maintained ever since

It has also been decided directly by the action of the Secretary, upon an official report of the Commissioner of the General Land Office, that our grant is one of quantity per mile, with the limitations indicated.

See the report of the Commissioner of the General Land Office to the Secretary, May 21, 1880 (extract appended), sanctioned by the Secretary by the approval of the list therewith submitted on the 19th of July, 1880.

See also Land Office Report, p. 27, March, 1882 (House Ex. Doc. 144, 47th Congress, 1st session, p. 28.)

In the Annual Report of the General Land Office for 1875, at p. 409, we find the "estimated quantity embraced in the limits of the grant" on the main line of our road to be 6,000,000 acres, and the "estimated quantity which the company will receive from the grant" to be 3,750,000 acres.

The grant to the Branch Line road within limits is estimated (same report and page) at 3,520,000 acres, of which the company will receive 3,000,000 acres.

In the case of Cedar Rapids Railroad Company *v.* Herring *et al.* (110 U. S. 27), owing to a change in legislative enactments and a change in the route of the railroad, the question of quantity became material. The plaintiff in error claimed the right to quantity along the line of original location, 345 miles; the defendants in error urged that they were entitled only on the line constructed, 271 miles long. The supreme court of Iowa and the United States supreme court upheld the contention of the defendants, and in deciding the case (p. 35) the court say:

It is believed that in no instance of the many grants of public lands made by Congress to aid in building railroads has the quantity been measured by any other rule than the length of the road constructed or required to be constructed by the grantee or its privy, and it would be the first departure from this principle known to us, if in this case Congress intended to give the same amount per mile of land for road not constructed.

If we apply this principle to the case of the Southern Pacific Railroad Company, it appears that for its grant of land per mile of road actually constructed it will be entitled to quantities as follows:

*On main line*, completed road, 474.42 miles. Twenty sections per mile or 12,800 acres amounts to 6,072,576 acres of land.

*Branch line*, completed, 346.96 miles of road, acquired 12,800 acres per mile, or 4,441,088 acres of land.

It is conceded by the General Land Office that the company cannot obtain more than 3,250,000 acres on its main line and not more than 3,000,000 acres on the branch line; but we know these estimates are in excess of the true quantity liable to be taken under the grant, including, as they do, the indemnity lands. (*See note at end.*)

The grants were made subsequent to extensive public disposals of lands in the regions through which the roads extend.

Much land is excluded from grant and from selection, by private land claims; much by the certifications to the State under the swamp, internal improvement, and school indemnity grants; much by reservations, sales, locations, pre-emptions, and homesteads; much by the exclusion of the mineral lands (for which, however, agricultural lands as indemnity are allowed). Indemnity is given for all these classes of lands excluded from grant, in primary limits, but lands of the same description are likewise excluded from selection outside the grant. They reduce the quantity of land liable to selection as indemnity by a large percentage, probably one-half of the entire indemnity belt.

These figures show that the quantity of the grants is limited not by the number of sections per mile of road, but by the lesser quantity of lands liable to the grant, to be found within the lateral limits of the road.

To the present time the company has obtained title for only 1,040,430 acres on its main line and 187,719 acres on its branch line.

It is thus shown that there are not any lands now withdrawn for the Southern Pacific Railroad Company of California in excess of the quantity to which the company is entitled under its grants; therefore, no restoration can now be made.

II.

The indemnity lands cannot be restored to market, because—

It is the intention of the laws of the grant that the Southern Pacific Company of California, at least for its main line, should receive all the granted lands earned by building the road. There is not left to the Secretary of the Interior a discretion to restore them so long as the quantity granted has not been patented to the company.

The grant is not a mere gift.

Sec. 18 of the act of July 27, 1866 (14 Stat., 292) is as follows:

That the *Southern Pacific Railroad, a company incorporated under the laws of the State of California*, is hereby authorized to connect with the said Atlantic and Pacific railroad, formed under this act, at such point near the boundary line of the State of California *as they shall deem most suitable for a railroad line to San Francisco*, and shall have a uniform gauge and rate of freight or fare with said road, and in consideration thereof, to aid in its construction, *shall have similar grants of land, subject to all the conditions and limitations herein provided*, and shall be required to construct its road on the like regulations as to time and manner with the Atlantic and Pacific railroad herein provided for.

This grant, as expressed in Sec. 18, *was made for a consideration*, and not as a gift. "In consideration thereof"—that is, in consideration of the expenditure of labor and capital in building a certain connecting road of a prescribed width of gauge by one party for the benefit of the other. The labor and expenditure are by the company, and the Government secures (section 3) "the safe and speedy transportation of the mails, troops, munitions of war, and public stores" over the road at reasonable rates, uniform with those of the Atlantic and Pacific railroad.

But the consideration would be good and ample if the company was to expend and did expend its money, whether the Government had any benefit or not.

The company was required to accept the terms of the law and assume the undertakings therein enumerated for its performance, and this it did in due time.

The act itself speaks the will of Congress, and this is to be ascertained from the language used. The rights ot the parties rest upon a statute of the United States. Its words as well as its reason, spirit, and intention leave, in our opinion, no room for doubt as to its true meaning. (U. S. *v.* Union Pac. R. R. Co., 91 U. S., at p. 72.)

The purpose of Congress, above all others, was to obtain the construction of the railroad. * * * For that the grants of land were made. * * * Every other consideration was subordinate to that. And we are to give such construction to the language, if possible, as will carry out the congressional intentions. (Platt *v.* Union Pac. R. R. Co., 99 U. S., at p. 60.)

This is a fair statement of the principles of interpretation applicable, and the object of Congress expressed in making our grant.

Various provisions in the law place the Government and the company in the attitude of *parties to a contract*, from which both are to derive benefits—on an equal footing—and each to perform the prescribed obligations to the other in good faith.

In harmony with the avowed purpose of aiding the building of the road Congress dedicated the granted lands, and by section 6 further provided:

That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; *and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company as provided in this act*, but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

This section of the law, it has been settled, by decisions of the Department and the United States supreme court, protects the granted lands against adverse appropriation.

In intention and spirit, if not in letter, it also applies to the indemnity lands. Both granted and indemnity limits are determined by the definite location of the road.

If this 6th section applies only to the granted limits it is surplusage, for the right to the tracts in granted limits vests by the location under provisions of section 3d, without section 6.

The words in section 6, "The odd sections hereby granted," comprehend the odd-numbered indemnity sections. They are granted to the

extent and amount of the land earned as fully as are those within twenty miles. Though an absolute right to particular tracts does not vest prior to the selection of them, the right so to select within ascertained limits is given by the statute.

Secretary Browning, when giving the order for withdrawal hereinbefore quoted, practically decided that the withdrawal to thirty miles was requisite and required by the terms of the grant.

Secretary Browning, and also Secretary Cox afterwards, proposed to set aside the entire withdrawal on the ground that the road was not located upon the line required by its charter; but, on consideration of all the facts, Congress interposed and confirmed the location (Joint Res. of 28th June, 1870, 16 Stat., 382), and directed the Secretary of the Interior "to cause patents to be issued to said company for the sections of land coterminous to each constructed section (of road) reported on as aforesaid *to the extent and amount* granted to said company by the said act of July 27, 1866."

The "*extent*" relates to limits, the "amount" to quantity, and the company is to have the quantity if found within the exterior limits.

To restore any lands, therefore, whilst this duty of the Secretary remains unperformed would do violence to the provisions of this law, which in effect said that no lands then withdrawn should be restored; the restoration which Secretary Cox had ordered (though temporarily suspended by him) should not be made so long as the lands opposite constructed roads remained unpatented.

On the 26th July, 1870, Secretary Cox advised the General Land Office that Congress had overruled his proposition to set aside the withdrawals for the Southern Pacific R. R. Co. of California. His letter is as follows:

DEPARTMENT OF THE INTERIOR,
*Washington, D. C., July 26, 1870.*

SIR: Referring to my letter of the 15th of December last, directing you to suspend, until further advised by this Department, all action under my decision of November 2d and 11th, 1869, ordering the restoration of lands withdrawn on account of the Southern Pacific Railroad Company of California, I have now to inform you that by a joint resolution of Congress, approved June 28th, 1870, the said company are authorized to construct their road and telegraph line, as near as may be, on the route indicated by the map filed in this Department January 3, 1867, and will, upon constructing their road and telegraph line on that route, in compliance with the provisions of the act of July 27, 1866, be entitled to patents for the granted lands.

You will advise the proper local officers of this legislation, *that the reservation of* 1867, *on account of the company, may be respected.*

Very respectfully, your obedient servant,

J. D. COX,
*Secretary.*

Hon. J. S. WILSON,
*Commissioner of the General Land Office.*

The meaning of this is, that the withdrawals are to stand until the patents for lands earned by construction of the road have been issued "to the extent and amount" granted.

In our view, the question whether lands withdrawn for indemnity to the Southern Pacific R. R. Co. can be restored, is here decided by Secretary Cox's interpretation of a statute, itself plain in its provisions,—and the decision is, that the law prohibits restoration, so long as land is due for road constructed and reported on, as provided in the grant.

III.

THE GRANT HAS NOT BEEN ADJUSTED SO FAR AS THE ROAD HAS BEEN COMPLETED, and the principal reason for this is that the Department has for six years refused to proceed with the work.

The company has made constant efforts ever since the construction and acceptance of its first sections of road to obtain patents for its granted lands, and the responsibility of delay in adjusting the grants rests with the Land Department, not with the company.

The act of Congress of July 1, 1864 (10 Stat., 355), required railroad companies to make selections of granted lands at the local land offices and to pay to the officers, fees therefor. To carry the same into effect, regulations were established in January, 1867 (2nd Lester's Land Laws, p. 362), which were reissued in 1879 (Copp's Land Owner, vol. 6, p. 151).

The later regulations refer to an act of Congress of July 31, 1876 (19 Stat., 121), which requires railroad companies ("unless exempted by law from the payment of such costs") to pay the costs of surveying, selecting, and conveying lands before receiving patents therefor.

This company has paid those costs (costs of surveying paid under protest) on large quantities of lands duly selected according to law and the regulations, and the lists are on file in the General Land Office, the Commissioner having delayed or declined patenting the same.

The aggregate of lands (June, 1887), on pending lists of selections for the main line of the road, is 511,115.42 acres; of money paid for surveys, $23,358.32; of fees of officers paid, $6,408.50; as follows:

*In Granted Limits.*

Acres, 315,606.71.

Amount of register's and receiver's fees paid, $3,953.50.

Amount of surveying fees paid, $14,556.82.

*In Indemnity Limits.*

Acres, 195,508.71.

Amount of register's and receiver's fees paid, $2,455.

Amount of surveying fees paid, $8,801.50.

In addition to these there are lists of selections along the *branch* line road now pending amounting to 232,147.85 acres.

Since the advent of the present executive administration, as attorney for the company I have repeatedly called attention to the applications for patents pending, and requested action thereon.

May 18, 1885.—The undersigned addressed the Commissioner asking patents for about 150,000 acres of selections opposite sections of road accepted by Presidents Grant and Hayes; and—

October 4, 1886—Filed a request for patents on five lists of granted lands, opposite sections of road accepted by the President from October 1, 1872, to February 13, 1878, inclusive.

In addition to these general requests, San Francisco list No. 4, of 43,937 acres, selected July 15, 1882, of lands lying opposite road accepted in 1871, was the subject of the following communications to the General Land Office and the Secretary of the Interior:

October 26, 1883.—To the Commissioner.

May 11, 1885.—To the Commissioner.

November 21, 1885.—To the Commissioner (appeal).

December 15, 1885.—To the Secretary of the Interior.

March 8, 1887.—To the Commissioner.

April 14, 1887.—To the Secretary.

All these demands have not achieved success. In fact, the General Land Office has practically refused to execute the law of grant on the main line of the road, and applications to the Secretary in the case of San Francisco list No. 4 (a test case) have so far been barren of results.

As viewed by the undersigned, the company, in asking for a patent on said list, has been demanding a legal right which the Department is by law bound to concede, and not asking a concession that the Secretary has a discretion to grant or refuse.

The lands hereinabove mentioned all lie opposite portions of road completed within the time prescribed in the law of grant.

As above shown, the company has invested $29,776.82 in fees and costs on list which the government refuses patents, and in our opinion the implication of the act of July 31, 1876, which provides that "before "any lands granted to any railroad company by the United States shall "be conveyed to said company * * * there shall first be paid into "the Treasury of the United States the cost of surveying, selecting, and "conveying said lands by the said company" is, that upon making such payments the patents shall issue.

The company is very greatly injured by the refusal to patent such lands, and is unable to perceive that there is any moral or legal obligation resting upon it to go forward and pay more money in the face of the refusal of the Land Department to patent the granted lands already paid for.

On the other hand, the duty of the Secretary to cause such lands to be patented appears upon the face of the existing statutes applicable to the subject, viz., section 4, act July 27, 1866, 14 Stat., 292: "Patents "of lands as aforesaid shall be issued to said company confirming to "said company the right and title to said lands situated opposite to and "coterminous with said completed section of said road."

The joint resolution of 28th June, 1870, 16 Stat., 382: "*It shall be the "duty* of the Secretary of the Interior *to cause patents to be issued* to said

"company for the sections of land coterminous to each constructed sec-
"tion reported on as aforesaid to the extent and amount granted to
"said company by the said act of July 27, 1866," &c.

This duty is not discharged until patents have issued to the *extent and amount* of lands acquired by the company under its grant; and when it appears that the said "extent and amount" will require every odd-numbered tract liable to selection that has been withdrawn from market, it is plain that the Department cannot consistently with law and morals restore any of the withdrawn lands for the purpose of otherwise disposing of them for account of the United States Treasury.

Though the duty of the Department to adjust the grant and patent the lands is declared by law, recent instructions to the surveyor general of California from the General Land Office have practically stopped all surveys, and made it impossible for the company to select some of the valuable tracts within its grant which have never been surveyed.

It may be proper here to state by way of explanation that this company has not been derelict in stating to the Department its claims.

On the 30th April, 1880, the undersigned filed a written argument in the General Land Office in support of the then pending demand for patents upon two lists of indemnity lands. The paper was submitted by the Commissioner to the Secretary, with a report upon the subject, dated May 21, 1880. In that paper I claimed 2,768,576 acres as earned on account of 231.92 miles of road then completed, and at that time only 950,877 acres had been patented.

In a printed brief filed by me in the Department of the Interior in December, 1885, the quantity of the grant for the main line road of 474½ miles completed was stated at 4,500,000 acres, of which only 1,040,430 acres had been patented.

It is therefore respectfully submitted that the company's claims have been heretofore made known to the Department, and I may add that heretofore as well as at the present time the company has been and is ready to facilitate the settlement of its land grant, as fully and speedily as possible.

When the Land Department, as above shown, has not, in a period of sixteen years, administered the grant to one-third of the lands to which the company has become entitled to patents, and while it does nothing in that direction, and expresses no hope of doing anything soon, the company would have a right to complain of unfair dealing if its granted lands are not withheld from market until the Department can fulfill its duties under the law. So far as indemnity selections are involved, the company under the law has an equal right to select anywhere within the prescribed limits until the grant is satisfied—the only limitation stated in the law being "not more than ten miles beyond the limits of said alternate sections," referring thus to the "ten alternate sections of land per mile on each side of said railroad"—that is, the indemnity may be selected anywhere within the 30-miles limits.

The same reasons which induced the order of Secretary Browning in withdrawing the indemnity lands in 1867, and that of Secretary Cox of 29th July, 1870, confirming such withdrawal, are to-day applicable with the same if not greater force. The circumstances of the case are not materially changed—the company still has a grant by Congress, which has been but partially administered—and the United States is still in default for non-fulfilment of the provision of section six, which enacts "that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of road," &c.

The Government has not surveyed all the lands within the limits of 30 miles which lies opposite to our completed road, and the orders of the General Land Office have put a stop to the surveying of mountain and timber land which, along some portions of the road, are the most valuable to the company of any lands within its limits.

A withdrawal on a line not authorized by law, or on a line of a proposed grant which was never made by Congress, may unquestionably be revoked; but, as stated in the recent exhaustive decision of the Secretary in the case of the Pueblo of San Francisco, "a Secretary has no power or authority to revise or reverse the final decree of his predecessor in a matter properly before him." (5 Dec., 492.)

The question of the nature of the grant, and extent of the withdrawal, were properly before Secretary Browning, upon direct application of the company to him, when he made the order. The question of revocation on the allegation that the withdrawal was not along the proper line of route, was raised, had been argued, and was pending before Secretary Cox when Congress intervened, and in obedience to Congress, Secretary Cox confirmed the withdrawal as ordered by his predecessors.

Since then there has been no essential change in the facts and none in the law, and there is no case before the Secretary that gives him proper jurisdiction to set aside what his predecessors have done in this matter.

The moral duty of the Government to maintain the indemnity withdrawal to its exterior limits is confidently claimed.

Respectfully submitted,

HENRY BEARD,
*Att'y for So. Pac. R. R. Co. of California.*

NOTE TO PAGE 7.—The exact quantity of land in the granted limits for which indemnity is given has not been ascertained, and can only be obtained by an examination of the plats and tract-books of the General Land Office. It would aid that work and would be actually necessary to its completion to first patent the lands to the company within primary limits that are conceded to belong to it.

Probably before the day limited (28th June) we shall be able to submit an estimate, somewhat in detail, made from an actual examination of the plats and records, that will approximate accuracy, showing the quantity of the grant and the quantity of lands within the limits thereof excepted therefrom.

*Estimate of the land grant opposite 232 miles of road completed before July 4, 1878, of the Southern Pacific Railroad main line, act July 27th, 1866.*

Approximate calculation June 20th, 1887, of the quantity of the grant, and of the lands lost within the 20-mile limits, and of the indemnity lands from which lieu therefor can be taken.

| | Acres. | Acres. |
|---|---|---|
| *Granted lands* (within 20-mile limits): | | |
| San José to Tres Pinos, 50 miles, at 12,800 acres per mile | 640,000 | |
| Huron to Mojave, 182 miles, at 12,800 acres per mile | 2,329,600 | |
| Total | 2,969,600 | |
| Deduct difference between 20 sections per mile, and the quantity of odd-numbered sections within 20 miles of the road | 200,000 | |
| Actual quantity of the grant | | 2,769,600 |
| *Losses of granted lands:* | | |
| Lands taken by W. P. R. R. Co., northeast of San José, by construction of its railroad, and lands in withdrawal for W. P. R. R., south of San José | 276,480 | |
| Mexican grants, San José to Tres Pinos | 218,880 | |
| Mexican grants, swamp lands, and areas covered by Tulare, Kern, and Buena Vista lakes, Huron to Mojave | 345,600 | |
| Pre-emptions, homesteads, cash entries, and State indemnity selections, San José to Tres Pinos, and Huron to Mojave | 76,987 | |
| Total | 917,947 | 917,947 |
| Total granted lands subject to selection | | 1,851,653 |
| Indemnity lands (between 20 and 30 mile limits): | | |
| San José to Tres Pinos, 50 miles, at 6,400 acres per mile | 320,000 | |
| Huron to Mojave, 182 miles, at 6,400 acres per mile | 1,164,800 | |
| | 1,484,800 | |
| Deduct for sinuosities of road | 100,000 | 1,384,800 |
| *Losses of indemnity lands*, deducted: | | |
| Lands not subject to selection between San José and Tres Pinos, and Huron and Mojave; parts of ocean and lakes, Mexican grants, pre-emptions, homesteads, cash entries, State indemnity selections, swamp lands, and Government reservations | 454,449 | 454,449 |
| Total indemnity subject to selection | | 930,351 |
| Deduct losses within 20-mile limits, as above | | 917,947 |
| Surplus of indemnity above losses | | 12,404 |

Condition, on the 20th June, 1887, of the work of adjusting the grant opposite the 232 miles of road completed before July 4, 1878.

| | | |
|---|---|---|
| Quantity of the grant | | 2,769,600 |
| Heretofore patented | 1,040,430 | |
| Selections pending in General Land Office | 511,115 | |
| | | 1,551,545 |
| Acres due the company | | 1,218,055 |

| *Condition of indemnity lands.* | Acres. |
|---|---|
| Tracts available for satisfying the grant | 930,351 |
| Indemnity lands heretofore selected | 426,000 |
| Indemnity lands liable to be selected | 504,351 |

NOTE: There have been no selections made or patents obtained for lands opposite the 242.50 miles of road completed in 1884.

HENRY BEARD,
*Attorney So. Pac. R. R. Co.*

WASHINGTON, *June* 30, 1887.

TENNESSEE & COOSA R. R. CO.

GUNTERSVILLE, MARSHALL COUNTY, ALABAMA, *June* 23, 1887.

To the Honorable L. Q. C. LAMAR,

*Secretary of the Interior:*

The memorial of the "Tennessee and Coosa Rail Road Company" showeth;

The memorialist was created a corporation by a special act of the General Assembly of the State of Alabama, approved January 16th 1844 entitled "an act to incorporate the Tennessee and Coosa Rail Road Company." The object and purpose of the incorporation was the construction of a rail road connecting the waters of the Tennessee and Coosa rivers within the State of Alabama, Gunter's Landing, or Guntersville, (being the same point) on the Tennessee river and Gadsden on the Coosa river, were and are the termini of the road. Not long after the enactment of the special statute of incorporation above referred to, a corporate organization was effected, which has been preserved continuously to the present time. The country lying between Guntersville and Gadsden is mountainous and the construction of a railroad is difficult and very expensive.

At the time of the incorporation, and until recently, it was but sparsely inhabited. From time to time the General Assembly of the State of Alabama made loans and appropriations to aid in the construction of the road because its construction was deemed of great public utility, and as essential to connect the waters of the Tennessee river and Mobile, and to draw into closer relationship the northern and southern parts of the State. The grading of the road was near completion in April 1861 when the war between the States commenced. The work on the road which was then being vigorously pressed was suspended in consequence of the war, and so remained until 1871. On the 12th of July 1871 this memorialist entered into a contract for the completion of the road on or before the first day of October 1873 with the "East Alabama and Cincinnati Railroad Company," a corporation chartered under the laws of the State of Alabama, for the construction of a railroad from Opelika in said State north to a point on the Tennessee State line, through Gadsden and Guntersville. Under this contract the said "East Alabama and Cincinnati Railroad Company" was let into possession of the road of this memorialist, and completed about five miles thereof. In 1873 the said Company became bankrupt, and to regain possession of its road this memorialist was compelled into litigation with its assignees and purchasers from them, which was not finally terminated until July 1885, when memorialist recovered the said road, and was restored to the possession thereof.

Since its restoration to possession and the granting of its title this memorialist has been laboring to complete said road, and has since completed six miles, having now in operation eleven miles of the whole

length of said road which is thirty six and one half miles, and upon which no less than five hundred thousand dollars have been expended. It is the purpose and expectation of this memorialist to complete said road within the next twelve months and have it in full operation.

By the Act of Congress approved June 3d 1856, there was granted to the State of Alabama, for the purpose of aiding in the construction of a railroad from the Tennessee river at or near Gunter's Landing to Gadsden on the Coosa river, and other railroads, alternate sections of land designated by odd numbers for six sections in width on each side of said railroad, and if when the line or route of the road was definitely fixed, it should appear that the United States had sold any of the lands so designated or that the right of pre-emption had attached, in lieu thereof, other lands could be selected within fifteen miles of said road on each side.

By an act of the General Assembly of the State of Alabama approved January 20th, 1858, the said grant was accepted, and in execution of the trust thereby enacted, the said lands were " granted to, conferred upon and vested in" this memorialist, for the purpose and under the restrictions specified in said act of Congress, and upon the execution of a bond by this memorialist faithfully to use the lands for the purpose of the donation, and to abide by and perform the provisions in said act of Congress contained, which bond was by this memorialist executed and delivered to the Governor of the State.

The line and route of the road of memorialist was definitely fixed. On the 23d June 1860 the Commissioner of the General Land Office, with the approval of the Secretary of the Interior thereon endorsed, certified to this memorialist as within the six miles limits, thirty six thousand three hundred and nine acres of land to which this memorialist was entitled; and also at the same time, with the like approval, certified to this memorialist as within the fifteen miles limits, thirty one thousand three hundred and seventy five acres of land to which this memorialist was entitled. The said lands are designated in said certificates by the numbers of the Governmental survey, and form parts of the first one hundred and twenty sections granted by the said act of Congress. Of said one hundred and twenty sections there remains a deficiency of nine thousand one hundred and sixteen acres. This deficiency can be supplied only by the selection of lands lying beyond the six miles limits, and within fifteen miles of the line or route of the road of memorialist, as it was, and is now definitely fixed. Within the limits aforesaid, of six and fifteen miles, the odd numbered sections have been and are now withdrawn from entry or sale.

By an order of your department of date May 23d 1887 this memorialist is required on or before the 28th day of the present month, to show cause why the order withdrawing said lands from entry and sale should not be revoked, and as such cause this memorialist would refer to the facts herein stated. The road of memorialist would have been long

since completed, and its title to the said lands freed from all condition, but from the circumstances above indicated, and which have intervened without its neglect or fault. The occurrence of the war, suspending during its continuance all such enterprises in the State of Alabama, the prostration of all industries, the impoverishment of the people; the destruction of all credit, public and private, were the main causes which prevented the completion of the road. The contract with the "East Alabama and Cincinnati Railroad Company" into which this memorialist was induced to enter because of its anxiety and solicitude to complete the said road, proved unfortunately a hindrance and obstacle to its completion, and the cause of protracted and vexatious litigation. Since the termination of that litigation and the restoration of this memorialist to possession of the road, work has been pressed on the road so far as the limited means of the memorialist would permit, and so far as it could be done without the creation of a debt which would embarrass all the future operations of the Company.

Since regaining possession six miles of the road have been completed, rolling stock purchased, and work on the road is progressing now, so that it is believed it may be stated confidently that within twelve months there will be a full completion, all the terms of the grant by Congress fully observed and performed, and the purpose of the donation accomplished.

All of which is respectfully submitted.

TENNESSEE AND COOSA RAILROAD CO.
By LOUIS WYETH, *President.*

THE STATE OF ALABAMA,
*Marshall County:*

Personally came before me Jno. D. Tayler, a notary public in and for the State and County aforesaid, Louis Wyeth, who being duly sworn deposes and swears that he is the President of the memorialist, Tennessee & Coosa Railroad Company, that he has personal knowledge of all the facts & matters set forth in this memorial, and that each and all of them are true.

LOUIS WYETH.

Sworn to & subscribed before me this 22d day of June 1887.
[L. S.] JNO D. TAYLER,
*Notary Public.*

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VICKSBURG & MERIDIAN R. R. CO.

JUNE 13, 1887.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior.*

SIR: Now comes the Vicksburg and Meridian Railroad Company of Mississippi by its attorney M. D. Brainard and for answer to the rule to show cause why the withdrawal of lands within the indemnity limits of

said road should not be revoked, and the lands therein embraced restored to settlement, said Company answering respectfully shows:

First. That all of the vacant lands within the indemnity limits of said road were selected several years ago in part satisfaction of the grant, and said selections are now pending before the General Land Office for appropriate action conveying the title to the State of Mississippi for the benefit of said road.

Secondly. There is not a *single acre* of vacant unselected land within the indemnity limits of said road which can be restored to settlement as all of said lands were needed and have been exhausted in order to satisfy the grant.

Respectfully submitted,

THE VICKSBURG AND MERIDIAN R. R. CO
By M. D. BRAINARD,
*Attorney in fact.*

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VICKSBURG, SHREVEPORT AND PACIFIC R. R. CO.

JUNE 16, 1887.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior,*

SIR: Now comes the Vicksburg Shreveport and Pacific Railroad Company by its attorney M. D. Brainard and for answer to the rule to show cause why the lands lying within the indemnity limits of said road should not be restored to settlement under the public land laws, said company answering respectfully shows:

First. That the grant to said Company by the act of Congress approved June 3, 1856, (11 Statutes p. 18,) was a grant of six sections per mile or 3,840 acres per mile within the six mile or granted limits, and where any of the granted sections had been disposed of before the definite location of the road or pre-emption rights had attached thereto, the agent of the State appointed by the Governor was authorized to select other lands in lieu thereof from the nearest tier of odd numbered sections lying outside of the granted limits and within fifteen miles on each side of the line of the road.

Secondly. Said company further answering respectfully shows, that said Railroad was definitely located from a point on the Mississippi River opposite Vicksburg westwardly on an air line through Shreveport to the Louisiana and Texas State line in the year 1856, a distance of 189 miles, and the lands lying within fifteen miles on each side of the line of the road were withdrawn by the Commissioner of the General Land Office January 27, 1857.

Thirdly. Said Company further answering respectfully shows that prior to the year 1861, the Secretary of the Interior conveyed to the Governor of Louisiana for the use of said road by proper evidences of title,

353,212 acres of land in part satisfaction of the grant. The majority of said lands so conveyed being within the indemnity limits of said road.

Fourth. Said company further answering respectfully shows that said railroad has been fully constructed and completed, and at the rate of six sections or 3840 acres of land per mile it has earned by such construction 725,760 acres of land or 372,548 acres of land more than the amount which have been conveyed to the State for its benefit.

Fifthly. Said company further answering respectfully shows that early in the year 1882, the records of the General Land Office were carefully and skillfully examined by the attorney and agents of said company and the condition of every 40 acre tract of land in every odd section within the entire limits of the grant were carefully examined and it was then ascertained that within said limits there remained only 20,652 acres of vacant land which had not been previously selected and conveyed to the State as before stated, and which could be selected in part satisfaction of the grant.

Sixthly. Said Company further answering respectfully shows that said 20,652 acres of vacant land above mentioned were selected by the agent of the State in part satisfaction of said grant in the year 1883, and said selections are now pending before the General Land Office for final adjustment and it is through no fault of said company that said lands have not been conveyed to said company by proper evidences of title, and the adjustment of the grant thus completed.

Seventhly. Said Company further answering avers that by the selection of said lands as aforesaid its right attached to the same, and it is not just or lawful for the department of the Interior to restore said lands to entry under the settlement laws as they are actually needed in part satisfaction of the grant and have been lawfully selected by competent authority, and because when they have been conveyed to the Company there will still remain an actual deficiency of 351,896 acres of land in order to satisfy the grant.

Respectfully submitted,

THE VICKSBURG, SHREVEPORT & PACIFIC R. R. CO.
By M. D. BRAINARD,
*Attorney.*

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WINONA & ST. PETER R. R. CO.

WASHINGTON, D. C., *June 17th*, 1887.

Hon. L. Q. C. LAMAR,
*Secretary of the Interior,*

SIR: In compliance with your Rule of 23d ult., to show cause why the several orders of withdrawal from settlement of the lands within the indemnity limits of the Winona and St Peter railroad land grant should not be revoked and the lands therein embraced restored, a copy of which

rule was served on the Winona and St Peter railroad Company through its President Albert Keep Esq, said Company now appears and makes answer as follows, to wit:

That by the Act of Congress of March 3d 1857, as amended by the Act of March 3d 1865, there was granted to the State of Minnesota to aid in the construction of a railroad from Winona to a point on the Big Sioux river south of the 45th parallel and now known as the Winona and St Peter railroad, ten sections of land designated by odd numbers, per mile to aid in the construction of said road, with the right to indemnity for such lands as might be found to have been sold or preempted &c., to be selected within a further limit of 10 miles on each side of the road.

That said Company duly constructed its line of road as required by the Statute.

That the total area of the granted sections or "sections in place" is 1,844,852.44 acres.

That the Company has listed all the lands in the "granted" limits found vacant and unappropriated except 330.84 acres.

That it has also selected all the lands withdrawn for purpose of indemnity, so far as found vacant and unappropriated, except 181.19 acres making in the granted and indemnity of 512.03 acres yet to be obtained.

That all the lands "listed" in the granted limits and all the lands "selected" in the indemnity limits except a few tracts suspended for specific causes have been certified by your Department to the State of Minnesota for the benefit of the Company.

That the total quantity of lands thus certified is 1,639,097$\frac{68}{100}$ acres; if to this is added the 512.03 acres yet to be listed and selected, it makes the total quantity found available in satisfaction of the grant, 1,639,-609.71 acres, leaving a deficit in the grant of 205,242.73 acres which the indemnity belt has failed to make good.

That the area of 181$\frac{19}{100}$ acres of indemnity lands above referred to embraces the following tracts, to wit:

| | Acres. |
|---|---|
| SW¼ SE¼ sec. 11, T. 113, R. 41, containing | 40 |
| NE SW¼ " 21, " 110, " 16, " | 40 |
| Lots 4 & 5 " 13, " 112, " 34, " | 61.19 |
| NW¼NW¼ " 27, " 106, " 35, " | 40 |
| Total | 181.19 |

That the Company is about to select said tracts and said selections will be filed with the proper district Land Officers before the 27th inst.

That when this selection is made the indemnity belt will, to the best information and belief of the Company, be exhausted of lands available for that purpose.

That for said reason there will be no lands within that belt to restore to settlement.

That, as above stated, the grant is deficient 205,242.73 acres, according to the examination which the Company has made.

Therefore should a formal official examination by your Department develop the existence of any further vacant, unappropriated and unselected tracts within said indemnity limit, the Company respectfully insist that it should be duly notified and opportunity afforded it to select the same in proper form before restoration of any such lands to settlement is made.

Wherefore the Company prays

1st—That no restoration shall embrace the lands herein specifically mentioned and which the Company are preparing to select, and

2d—That no restoration should be made until the Company has had opportunity afforded it, after proper notice, to select any further tracts which a formal official examination of the grant by your Department shall show to be vacant and unappropriated, or which may become so by the vacation of other claims.

This, to the end that the purpose of Congress to give for said Company ten sections of land per mile, to aid in the construction of the road shall be justly and honestly carried out to the last acre that may be properly obtained.

W. K. MENDENHALL,
*Att'y Winona & St. Peter Railroad Company.*

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WISCONSIN CENTRAL R. R. CO.

WASHINGTON, D. C., *June* 16, 1887.

Hon. L. Q. C. LAMAR,
*Secty. of the Interior.*

SIR: The Wisconsin Central Railroad Company acknowledges the receipt of your order of 1st inst. in words as follows, to wit:

It appearing from the records of this Department that an order withdrawing lands from settlement under the public land laws within the indemnity limits of the Wisconsin Central Railroad, (formerly Portage, Winnebago and Superior) in the State of Wisconsin made December 10, 1869, is still existing, and that said road has not informed this Department to what extent it is entitled to lands within such indemnity limits by reason of those lost in place of its grant, and that ample time has been given it to assert its right in this behalf; and it now appearing further that no sufficient reason exists for longer continuing in force said order of withdrawal, or that a time certain should be fixed within which the rights of this road should be asserted, and that lands to which it is not entitled within said indemnity limits should be restored to settlement, now, rule is hereby entered on said railroad company to show cause on or before the 28th day of June, 1887, why said order of withdrawal should not be revoked or such other action taken as shall speedily restore such lands to the public domain for settlement.

This rule is made returnable before you on the 28th inst. at 10 o'clock a. m.

Now, therefore, comes the Wisconsin Central Railroad Company by its counsel, and for answer thereto says:

That the grant of lands to aid in the construction of said road was made May 5, 1864; (13 Stat., 64) that the map of definite location of the line of road was filed in September, 1869, and the lands within the granted and indemnity limits withdrawn from entry or sale in December following.

That by the terms of the Act (sec. 7) patents for all lands earned were to be issued as each section of 20 miles of road was constructed.

That the time fixed for the completion of the road was December 31, 1876, (Act April 9, 1874, 16 Stat. 28).

That the road for which the grant was made extended from Portage City to Bayfield, and thence to Superior, in the State of Wisconsin.

That the Company proceeded with the construction of the road, and on the 31st December, 1876, had, with the exception of a small gap of about 26 miles, a continuous road constructed from Portage City to Ashland on Lake Superior.

That the said 26 miles was completed in May, 1877, about 4 or 5 months after the expiration of the time fixed by the law.

That said Company has, therefore, a continuous line of road from Portage City to Ashland, which has been duly certified to your Department by the Governor of Wisconsin, as required in the Statute.

That said line of road is 257 miles in length, and the Company would be entitled to patents therefor for about 1,600,000 acres.

That said Company has constructed no road under said grant, beyond Ashland.

That in the years 1873, 4, 5, 6 and 7, said Company duly presented to the Commissioner of the General Land Office, lists of the land "in place" (granted lands) along such completed road, and also lists of selections of "indemnity" lands opposite said road, in lieu of lands "in place" lost by sales, preemptions and other causes.

That there has been found "in place" along said constructed road only about 420,000 acres, leaving a deficit to be supplied from the indemnity belt of about 1,180,000 acres.

That within said indemnity belt between Portage and Ashland on said 257 miles of constructed road, the Company has selected all the lands which appeared to be vacant and available, amounting to about 400,000 acres, leaving a deficit still remaining of 780,000 acres.

That, of the lands thus listed and selected "in place" and in indemnity limits, the Company has received patents from the Government for but 642,703 acres.

That the last patent issued to the Company was in November, 1882.

That, as shown by the enclosed copies of letters, No. 1 to 4, inclusive, the claims of the Company for patents; the extent of their grant and of their claim for indemnity, was brought to the attention of the Land Department; their right to patents favorably decided by the Secretary, and directions given to cause the lists to be submitted for approval.

It will be seen by these letters that all questions affecting the right of the Company have been considered and decided by your Department.

After the specific lists referred to were approved and patented there still remained of granted lands, about 5,000 acres, and of indemnity land about 171,000 acres unpatented, a total of 176,000 acres, and on 5th of November, 1882, the Company, through its attorney (see copy of letter, No. 5) and to comply with the requirement of the Office, filed with the then Commissioner a list embracing tracts so selected for indemnity and designating certain lands "in place" lost by sales &c., as bases for said selections, and requested the issue of patents for said indemnity lands. That said list was returned for incorrectness, but refiled Feb., 1883, with a repetition of request for patent. (See copy No. 6.)

Although it is now more than *four years* since this request was made, and ten years since the lands were selected, the Commissioner of the General Land Office has failed to act upon said list and request.

Therefore, the Wisconsin Central Railroad Company respectfully suggests that it has not failed to make known to the Land Department to what extent it is entitled to lands within the indemnity limits, but, on the contrary, that it has been since 1882, knocking at the door of your Department, and asking for its patents for said indemnity lands.

Why the patents should be withheld, the Company is unable to see. The decision of the Secretary, of October 2nd 1882 (No. 4); the decision of your Honor of Aug. 20, 1886, in the Farm Mortgage Land Case (5 L. D. 89), and of Mch. 22, 1887, in case of Chicago, St. P., M. & O. Ry. Co. (5 L. D. 511) conclude the question; and our patents should be given us on the remainder of our lands, so long selected, without further delay. "What the Statute directs it means to have done. Not to do it, or even to delay unnecessarily the doing of it, is to violate the Statute and involves a grave dereliction of duty." (Wis. Farm Mort. Land Co. *supra.*)

Until patents have issued to the Company on these selections, it cannot know to what quantity of land in the indemnity limits it will acquire title, and cannot know what further quantity to select, should there be any land now in said limits unselected by it.

The Company, therefore, prays that an order shall issue to the Commissioner of the General Land Office to send up for approval the lists of said Company's lands, granted and indemnity, now pending before him, which shall be found free from other adverse rights.

It also prays that said lists when sent up, shall receive your early approval and order for patents, and that until said patents issue no order restoring unselected lands, if there be any in the indemnity limits, shall be given.

W. K. MENDENHALL,
J. H. McGOWAN,
*Counsel for Wisconsin Railroad Company.*

## WISCONSIN FARM MORTGAGE COMPANY.

Hon. L. Q. C. LAMAR,

*Secretary of the Interior.*

SIR:—Now comes the Wisconsin Farm Mortgage Company by its counsel, and answering the rule entered by you upon said Company on May 23, 1887, and returnable June 27, 1887, to show cause why its existing indemnity withdrawal "should not be revoked and the lands therein embraced restored to settlement", respectfully shows:

*First:* That by act of June 3, 1856 (11 Stats., 20) Congress granted lands to the State of Wisconsin, to aid in the construction (*inter alia*) of a railroad from Madison or Columbus via Portage City to the St. Croix River. The grant was of six odd numbered sections per mile on each side of the road, with right to select other lands within larger limits of fifteen miles for lands within the grant in place, which were found on definite location to have been "sold, or otherwise appropriated, or to which the right of pre-emption has attached."

*Second:* Said grant was conferred by the State upon the La Crosse and Milwaukee R. R Co., by whom the road was definitely located and sixty-one miles thereof between Portage and Tomah constructed. The company then failing was sold out under foreclosure.

The road between Portage and Tomah was built with funds furnished by the farmers along the line and raised on mortgages of their farms. To indemnify the farmers' losses the United States, the State and the foreclosure purchasers of their assigns consented that that the lands earned by construction of this portion of the road should be transferred to the farmers.

The Farm Mortgage Company was organized to that end and the proceeding was ratified by Congress on July 27, 1868 (15 Stats., 238).

*Third:*—By the decision and decree of the U. S. Circuit Court in a case involving the rights of all Companies claiming under the railroad grant to the State, it was held that the Farm Mortgage Co., was entitled to "*the full quantity of six sections per mile of railroad construction between* said Portage City and Tomah," deducting for all meandered ponds, lakes, and water courses" found therein.

| | Acres. |
|---|---|
| Such quantity aggregated | 230,771.13 |
| The Company had received | 68,811.07 |
| Leaving due | 161,900.06 |

For which the same decree provided indemnity should be taken from the limits of the grant of 1856 beyond the termini of this constructed road.

*Fourth:* Pursuant thereto said Company selected indemnity in part satisfaction of this deficiency as follows:

| | Acres. |
|---|---|
| November 4, 1882 | 44,533.44 |
| May 12, 1883 | 79,003.72 |
| | 123,537.16 |

*Fifth:* By your decision of August 20, 1886 (5 L. D., 89) you concurred in the stated decision of said Circuit Court, and directed certification of the lands selected accordingly.

*Sixth:* Thereunder such selected lands have been certified to the State *excepting* only 7,700 acres which are suspended because falling within the granted limits of the Northern Pacific Railroad Grant. This conflict has not yet been adjusted by formal decision.

*Seventh:* Wherefore this Company has no objection to the present revocation of the existing indemnity withdrawal, *provided* the same shall in clear terms except therefrom all *selected* lands pending final determination of the questions presented on the conflict above stated. As the lands in conflict belong either to this Company or the Northern Pacific Company, it is respectfully submitted no restoration thereof is possible whereby any legal rights could now be acquired by third parties therein.

Respectfully submitted,

BRITTON & GRAY,
*Atty's for Wis. Farm Mort. Co.*

## ATLANTIC AND PACIFIC RAILROAD COMPANY—INDEMNITY WITHDRAWAL.

DEPARTMENT OF THE INTERIOR,
*Washington, D. C., August* 13, 1887.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: I have considered the showing made by the Atlantic and Pacific Railroad Company, in response to the rule of May 23, 1887, to show cause why the withdrawal of the lands within its indemnity limits should not be revoked, and said lands thrown open to settlement.

The answer of the company covers only that portion of said road west of the State of Missouri, it being asserted that the portion constructed within said State has by foreclosure sale passed into other hands.

The answer asserts that from its junction at Isleta, New Mexico, with the Atchison, Topeka and Santa Fé Railroad, five hundred and sixty-five miles of road westward, to the Arizona line, have been constructed, and accepted by the President, in accordance with the provisions of the granting act; whereby the company earned the lands opposite said road, and also the right to select indemnity for such as were, at the date of definite location, "granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of;" that opportunity for selection of either place or indemnity lands was not afforded by reason of the failure of the government to make survey of the lands in question; that to remedy this situation the company offered to deposit the necessary funds to pay for the making of surveys; but such offer was declined by your office; that afterwards, on September 3, 1885, the company presented to the register and receiver of each land district wherein any such lands were situated, a "broad application to select all the odd sections, both surveyed and unsurveyed, within its indemnity belt," which application was accompanied by a statement showing that, if the company were given every odd section there would yet be a deficiency of over one million of acres on its constructed line; and at the same time offer was made to pay all fees and costs of surveys, etc. This application was also denied.

The company further alleges that, during June, 1887, selections were made of all surveyed indemnity land opposite its constructed line, proper bases being shown for said selections, and the same were accepted by the local officers; that at the same time application was made for all the unsurveyed indemnity lands, attempting to give a proximate description thereof by protracting section, town, and range lines on the maps of withdrawal; specifying also the basis for the indemnity claim. These applications were also rejected.

It is also asserted that the area of the grant opposite the constructed road in New Mexico and Arizona is 14,473,766 acres; that the loss in said area, by private grants and reservations, is 3,310,886 acres, the losses by pre-emption, homestead claims, or minerals, not being ascer-

tainable even by approximation; to meet which loss it is asserted there is only available some two millions of acres within the indemnity belt.

On this asserted state of facts it is insisted that the company is entitled to indemnity lands; that there has been no want of proper diligence on its part in the assertion of its claim thereto; that the delay and difficulty has arisen entirely from the failure of the United States to make the necessary surveys and adjust private land claims within said limits, and that a revocation of the indemnity withdrawals under these circumstances would be a gross violation of the contract between the government and the road.

It is not necessary at present to inquire into the accuracy of the matters of fact stated in said answer. As to the rights of the company under the law, conceding the alleged facts to be true, it is proper I should express an opinion and make known to you my judgment.

It is not to be denied that the act of July 27, 1866 (14 Stat., 292), incorporating the Atlantic and Pacific Railroad Company, and granting to it certain lands, is both a legislative grant and a contract. This being so, and said contract being now set up by the company as a bar to the right of the executive to revoke existing indemnity withdrawals, it is proper to examine said act, and see exactly what the contract was.

The third sections of the act grants to the company ten odd numbered sections of land, on each side of the line of its road passing through the States, and twenty sections, where the road passes through the Territories; and also provides that indemnity for the lands lost within the granted limits by reason of the causes stated in said act may be selected from the odd numbered sections within the further limits of ten miles. Section six provides—

That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd numbered sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act;

but the provisions of the homestead and pre-emption laws are extended "to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company."

Now here was a grant to the free, alternate odd-numbered sections to be found within twenty miles on each side of the road in the States, and within forty miles in the Territories; with the right to take the free odd-numbered sections found within a further limit of ten miles, as indemnity for lands lost in the granted limits. The order was for the survey of the lands "for forty miles in width" or only to the extent of the granted limits in the Territories, and ten miles beyond the granted and indemnity limits in the States.

While surveys were to be made to this extent, the withdrawal of lands "after the general route shall be fixed" "from sale or entry, of pre-

emption before or after survey" only related to "the odd sections *hereby granted.*" This plain statement shows the contract of the government was to give the stated quantity of land if it could be found free within the granted limits; and for the purpose of securing as far as possible the full fruition of the grant to the company, the act, creating alike the grant and the contract, made a legislative withdrawal of the lands within the granted limits as soon as they should be indicated by the map of general route.

As to the lands within the indemnity limits, the contract was based upon two contingencies; that of losing lands within the granted limits, and being able to find sufficient to indemnify the company along the odd-numbered sections within a further limit of ten miles. Here the interest of the company was so remote and contingent, being a mere potentiality, and not a grant, that Congress declined to order a withdrawal for the benefit of the same, or even a survey within the territories.

It is apparent from the granting clause of said act that the grant was not one of quantity, but for a certain number of sections in place; and if not there, then it gave the privilege of looking for the deficiency in restricted limits. Had Congress intended the company should absolutely have the full quantity of land designated, it would not have restricted the right to select to the odd sections within ten miles, but would have placed no lateral limit upon the right of selection, as in the case of the Burlington and Missouri River Railroad (98 U. S., 334). Therefore if the company does not get the full amount of the sections within the primary limits and fails to make up its losses in the secondary limits, there is no violation of contract anywhere, that I can see; but only the happening of a contingency plainly contemplated by the granting act, subject to which the company made its contract.

Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws the lands within the indemnity limits of said grant, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise. It would seem that the very words of the act, "the odd-numbered sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act," of themselves indicate most clearly the legislative will that there should not be withdrawn for the benefit of said company from sale or entry any other lands, except the odd-numbered sections within the granted limits, as expressly designated in the act. But when the provision following this, in the very same sentence, is considered—"but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "an act to secure homesteads to actual settlers upon the public domain," approved May 20, 1862, *shall be* and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted

to said company"—it is difficult to resist the conclusion that Congress intended that "all other lands excepting those hereby granted to said company" shall be open to settlement under the pre-emption and homestead laws, and to prohibit the exercise of any discretion in the executive in the matter of determining what lands shall or shall not be withdrawn.

Waiving all question as to whether or not said granting act took from the Secretary full authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands; and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken. The company would be placed exactly in the position which the law gave it, and deprived of no rights acquired thereunder. It would have its right to select indemnity for lost lands, but in so doing it would have no advantage over the settler, as it now has, in contravention of the policy of the government in denial of the rights unquestionably conferred upon settlers by the land laws of the country, apparently specially protected by the provisions of the granting act under consideration.

Having examined the act of Congress and ascertained just what grant or contract was made, I turn to the assertion that no proper opportunity has been afforded the company to identify or select either granted or indemnity lands along a large part of its line, because of the failure of the government to make the necessary surveys. On the mere statement of this position, conceding its truth, it would seem that a revocation of the withdrawal as to the unsurveyed lands would be an act of great injustice on the part of the executive, especially as the company alleges that it offered (and the fact is conceded) to advance and deposit a sufficient sum of money to cover the cost of said surveys, which offer was declined by the land office.

In relation to this offer to deposit the cost of survey, I have to say that I know of no law that authorizes the officers of the land department to accept or use such deposit of money for the purpose named. There are laws which authorize special deposits for the purpose of making surveys at the instance of settlers, and also laws relating to the surveys of private grants. But there is no law that I have found which authorizes such deposits for the purpose of surveying lands within railroad limits.

The law which, it is claimed, authorizes the acceptance of the company's offer, is the act of July 31, 1876 (19 Stat., 121), relating to surveys of public lands. This act says:

That before any land granted to any railroad by the United States, shall be conveyed to such company, * * * there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same, by said company or persons in interest.

Under this law the proper officers of the government have authority to receive from the company such sums as would cover the expenses spoken of, but I do not construe it so as to authorize a deposit in advance, of an estimated sum for the purpose of making a survey of the railroad lands and which deposit, instead of being paid into the Treasury, as the law says, is to be retained by the Commissioner and used as he may think best. It is clear that the payment required by the act is only the reimbursement to the government of the expense of surveying, etc., of such lands as the company may be entitled to. The company is only entitled to the alternate odd-numbered sections within the limits fixed, and, if it were to get all these, it would get but one-half of the lands which must necessarily be surveyed along its line; and for this half only does the law exact payment and authorize the receipt of money by its officers. If the officers of the Land Department were to accept a deposit from the company in advance, and devote it to surveying railroad lands, money would still be necessary to pay for the survey of the other half of the lands, for it is utterly impossible to survey the odd sections without surveying those bearing even numbers.

The proposal of the company to furnish enough money to cover the whole expense of a survey, and let it stand as deposit for future adjustment—in other words, to lend the Commissioner of the General Land Office a sum of money which the law did not authorize him to borrow, in order to do that which the law making power had omitted to do, but which the company wanted done—was very properly declined (See 9 C. L. O. 99) and his action was approved by this Department.

The matter of appropriating money to make public surveys is one entirely within the province of Congress, and, if on a failure to make, what the Commissioner might think was an adequate appropriation, that officer should borrow a sum of money in order to do that which he thought ought to be done, he would not only be acting outside of the law, but in actual violation of its express provisions.

When this grant was made to the Atlantic and Pacific Railroad Company, it is true, the act directed the survey of the granted limits in the territories, and ten miles beyond both granted and indemnity limits in the States, but the grantees well knew that such surveys could only be commenced and completed when a proper appropriation was made by Congress and subject to the convenience of Congress and the contingency of that appropriation, the grant was accepted. The right to order such surveys is entirely beyond the power of the executive, who can only administer the laws as enacted, and who can only expend as directed such money as has been duly appropriated, having no authority to draw such money from any other source.

The attention of Congress has been repeatedly called to the subject of these surveys, but in the exercise of its wisdom it has not thought proper to make such appropriations as were suggested, and the matter remains exactly where it was when the grant was made.

This Department, charged with the administration of the land laws, acted with the utmost, if not questionable liberality when it withdrew the land in the indemnity belt—a liberality which Congress declined to exhibit. This liberality was further shown by the fact that the indemnity lands were withdrawn long before a mile of road was built, and continued withdrawn long after the time prescribed by law for its construction had expired; and more than liberality is shown, in that, during the period of such withdrawals, the company is allowed to present and have approved by the local officers its lists of selections without giving public notice of any kind; whilst the pre-emption or homestead settler, though his residence upon and cultivation of his land has been open and notorious for years, is compelled to give thirty days notice by advertisement and posting, before he is allowed to show by proof a right to his home, so that any one interested may appear and protest on the day named against said proof, or contest his right. And the Department is not now to be charged with injustice or illiberality because it does not propose to keep in perpetual reservation a territory of such vast extent as was withdrawn for the benefit of this road.

Criticism upon the alleged shortcomings of the government with respect to this grant come with an ill grace from this company. The people, whom the government represents, had some rights under the grant, as well as the company. That act was not passed and that contract made for the sole benefit of the company. Mutuality in benefit was expected and intended, and mutual obligations were entered into; and equity and good conscience would require of both parties a faithful observance of these obligations.

The Atlantic and Pacific Company proposed to build a railroad from Springfield, Missouri, thence to the western boundary of the State; thence to a point on the Canadian river; thence to the town of Albuquerque, in New Mexico, thence to the head-waters of the Colorado Chiquito; thence along the thirty-fifth parallel of latitude to the Colorado river; thence to the Pacific Ocean. The government was asked to make a grant of land to aid in the construction of this proposed road.

This was done in a most liberal manner; but it was provided by the eighth section of the granting act:—

That each and every grant, right and privilege herein are so made and given to and accepted by the said Atlantic and Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete *the main line of the whole road* by the fourth day of July, anno Domini 1878.

Did the company comply with this clear and specific contract? Did it commence the construction of its road in two years named? Did it prosecute the work as required? Did it complete its main line at the time named? In fact *has it yet completed the main line?*

If at the time this company applied for its grant, it had stated its purpose was to build the proposed road, or so much of it as it might desire, from time to time, and in such fragments, or to and from such points as pleased its management, and that the government should withdraw from entry and settlement along its whole line all the land in both granted and indemnity limits, and keep such lands in a state of indefinite withdrawal to wait the pleasure or convenience of the company, is it to be believed for a moment that Congress would have listened to the application for a grant? Yet this is exactly what the company now insist Congress has done; with the further assertion that though the company may violate every specification of its contract, the government is bound in equity, not only to carry out the contract on its side, but to guarantee to it a monopoly for an indefinite period of a vast part of the public domain not contemplated by the grant. I do not so understand either the law or the equity of the case.

On a full consideration of the whole subject I conclude that the withdrawal for indemnity purposes if permissible under the law was solely by virtue of executive authority, and may be revoked by the same authority; that such revocation would not be a violation of either law or equity, and that said lands having been so long withheld for the benefit of the company, the time has arrived when public policy and justice demand the withdrawal should be revoked and some regard had for the rights of those seeking and needing homes on the public domain.

If I had any doubt I would be confirmed in this course by what may be regarded as a distinct recognition by Congress of the correctness of its policy, to be found in Section three of the Act of April 21, 1876 (19 Stat., 35), where it is said:

> That all such pre-emptions and homestead entries, which may have been made by the permission of the Land Department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to the expiration of such grants, shall be deemed valid; and a compliance with the laws and the making of the proof required shall entitle the holder of such claim to a patent.

I therefore direct that all lands under withdrawals heretofore made and held for indemnity purposes under the grant to the Atlantic and Pacific Railroad Company be restored to the public domain and opened to settlement under the general land laws, except such lands as may be covered by approved selections; provided the restoration shall not affect the rights acquired within the primary or granted limits of any other congressional grant. As to the lands covered by unapproved selections, applications to make filings and entries thereon may be received, noted and held subject to the claim of the company, of which claim the applicant must be distinctly informed, and memoranda thereof entered upon his papers. Whenever such application to file or enter is presented, alleging upon sufficient *prima facie* showing that the land is from any cause not subject to the company's right of selection, notice

thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of such filing or entry. Should the company fail to respond or show cause before the local officers why the application should not be allowed, said application for filing or entry will be admitted, and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rules of practice to determine whether said land is subject to the right of the company to make selection of the same, which shall be determined by the register and receiver, subject to the right of appeal in either party.

When appeals are taken from the decision of the register and receiver to your office in the class of cases herein provided for, you will dispose of them without delay, and if the decision of your office shall be in favor of the company, and no appeal be taken, the land shall be approved or certified for patent, without requiring further action on the part of the company except the payment of fees and dues. If the decision of your office should be adverse to the company, and no appeal be taken, the selection will be canceled, and the filing or entry be allowed, subject to compliance with the law.

The order of revocation herein directed shall take effect as soon as issued, but filings and entries of the land embraced therein shall not be received until after giving notice of the same by public advertisement for a period of thirty days, it being the intention of this order that, as against actual settlement hereafter made, the orders of the Department withdrawing said lands shall no longer be an obstacle. Rights heretofore attaching, both of the company and of settlers, will be decided according to the facts in each case.

If any lists of selections have been presented by the company with tender of fees, which have been rejected and not placed on file and noted on the records of the local office, you will, if said lists are in your office or in the local office, cause said selections to be noted on the record immediately; and if such lists are not in your office or the local office, you will advise the attorney of the company that they will be allowed to file in the local office said lists of selections, and the same will be noted on the records as of the date when first presented; provided the same be presented before the lands are opened to filings and entries.

Very respectfully,

L. Q. C. LAMAR,
*Secretary.*

NOTE.—Following this decision, and acting upon the respective answers filed under the rule of May 23d, Mr. Secretary Lamar, on August 15, 1887, revoked the orders of withdrawal made for the benefit of the following named companies: Alabama and Chattanooga R. R. Co., California and Oregon Land Company, California and Oregon R. R. Co. consolidated with the Central Pacific R. R. Co., Chicago, St. Paul Min-

neapolis and Omaha Ry. Co., Dalles Military Road Co., Flint and Pere Marquette R. R. Co., Florida Railway and Navigation Co., Gulf and Ship Island R. R. Co., Marquette, Houghton and Ontonagon R. R. Co., Missouri, Kansas and Texas Ry. Co., Mobile and Girard Railroad Co., New Orleans Pacific Ry. Co., Northern Pacific R. R. Co., Oregon and California R. R. Co., Oregon Central Wagon Road Co., Pensacola and Atlantic R. R. Co., St. Louis, Iron Mountain, and Southern Ry. Co., St. Paul and Duluth R. R. Co., Southern Pacific R. R. Co., Tennessee and Coosa R. R. Co., Vicksburg and Meridian R. R. Co., Vicksburg, Shreveport and Pacific R. R. Co., Wisconsin Central R. R. Co., Wisconsin Farm Mortgage Co.

The following companies having failed to answer, their withdrawals were revoked as follows:

*State of Alabama.*—South and North Alabama; Selma, Rome and Dalton; Alabama and Florida.

*State of Florida.*—Florida, Atlantic and Gulf Central; Pensacola and Georgia; Florida and Alabama.

*State of Iowa.*—Burlington and Missouri River; Chicago, Rock Island and Pacific; Dubuque and Pacific.

*State of Kansas.*—St. Joseph and Denver City.

*State of Michigan.*—Grand Rapids and Indiana; Jackson, Lansing and Saginaw; Chicago and Northwestern.

*State of Wisconsin.*—Chicago and Northwestern.

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